BEFORE THE PUBLIC UTILITIES COMMISSION
OF STATE OF CALIFORNIA

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Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Comcast Phone of California, LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses.	I.13-10-003 (Filed October 3, 2013)

REPLY BRIEF
OF THE SAFETY AND ENFORCEMENT DIVISION

(PUBLIC VERSION)

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I. INTRODUCTION

Pursuant to Rule 13.11 of the Commission's Rules of Practice and Procedure,[1] the Safety and Enforcement Division (SED) files this Reply to the post-hearing Opening Brief filed in this Investigation by Comcast Phone of California, LLC (U-5698-C) and its Related Entities (collectively "Comcast"). The Investigation relates to the unauthorized disclosure and publication on the Internet and elsewhere of the names, addresses, and phone numbers of approximately 75,000 California customers[2] who had paid for an unlisted or non-published number (the "Breach").

Comcast does not contest that it caused the Breach of unlisted or non-published ("non-published") telephone numbers. Also uncontested is that it took Comcast approximately 28 months to detect and then comprehend the scope of the privacy Breach. It then took Comcast roughly a month to put a "fix" in place, and another month to report the Breach to the Commission. The Breach was substantially larger than Comcast initially reported.

That said, Comcast's Opening Brief is more notable for what it does not address than what it does. It skips over a key question (agreed to in the Joint Briefing Outline) of *why* it took 28 months to discover that there had been a major privacy breach.[3] Nor does it respond to the issue raised in SED's testimony, as well as at hearing, as to whether there were in fact multiple breaches. Or, why Comcast chose to use one database for service provisioning (which failed), rather than the database it used for billing (which functioned

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[1] *See* also the February 11, 2014 Scoping Memo, and the August 25, 2014 ALJ Ruling Granting Comcast's Motion to Extend, as modified at the October 3, 2014 evidentiary hearing in this matter.

[2] SED will use the 75,000 number throughout, and refer to them all as non-published, although a very small number of the total although the total were unlisted rather than non-published (unlisted keeps a subscriber out of directories, but not out of directory assistance, non-published does both), and although the total number was slightly less than 75,000. *See* Exhibit SED 3C, Momoh Rebuttal Testimony, at 2, for totals.

[3] Although Comcast addresses this obliquely with a few sentences in another section on its "needle in a haystack" alibi, it simply ignores the portion of the Briefing Outline assigned to whether the "Release [could] have been discovered earlier." *See* Appendix 1 to Comcast Brief.

correctly during the entire period).[4] Or, what uses licensee Targus/Neustar made out of the Comcast listings, including non-published listings, or – indeed – why Comcast chose to send non-published listings to Targus/Neustar at all.[5] SED put all of these matters at issue before and during the hearings, but Comcast simply ignores them. The fact-lite nature of Comcast's Brief raises the specter that Comcast will present a fuller version of its story in its Reply Brief, when SED will have no opportunity to respond.

Comcast also declines to address many of the legal issues addressed in the Scoping Memo, sovereignly declaring that as to certain of those issues – violations of the Commission's General Orders and other state laws – it will "reserve for reply,"[6] and the legal question of whether its disclosures were adequate (although it discusses this factually).

Rather than dwell on the fact that non-published subscriber information (name, address, and telephone number, in most cases) of 75,000 Californians was released to the Internet, Comcast contests the Commission's jurisdiction to do anything about it. In so doing, it largely reasserts the arguments it made in moving to dismiss this Investigation at the outset, arguments that were rejected in the March 11, 2014 ALJ Ruling. It also seeks to defuse (and diffuse) the reality of the breach by situating it within Comcast's own version of a "regulatory background," where competition rules in the directory listing world, and the privacy rights of consumers are largely absent.[7]

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[4] *See* discussion in section III(A), *infra*.

[5] Other issues, like whether the breach in fact began in February 2010 or earlier, rather than Comcast's dating of the first breach to July 1, 2010, are treated only in passing in Comcast's Brief.

[6] To the extent that Comcast raises new factual or legal assertions, assertions that could/should have been raised in response to the OII, the Scoping Memo, and/or SED's case (i.e., prepared testimony, SED's Opening Statement, and testimony elicited at the evidentiary hearing), SED reserves the right to request an opportunity to reply.

[7] *See* Comcast Brief, at 7 *ff*.

II. BACKGROUND

A. Comcast's Description of the Non-Published Listings' "Regulatory Background" Is Distorted

Comcast begins with a description of what it claims is the "regulatory background" of this case, one almost entirely devoid of customers' privacy concerns. Comcast's assertion that "the 1996 Act created a competitive, independent directory publishing business" is true enough,[8] but obscures the fact that the 1996 Act also left telecommunications carriers, like Comcast Phone of California, LLC ("Comcast Phone"), primarily responsible for the distribution of directory list information and the protection of customers' privacy.[9] The 1996 Act was not meant to give them a free pass regarding the privacy interests of their subscribers; in fact, Congress was concerned enough about privacy to dedicate an entire Code section to it.[10]

Comcast's notion that the 1996 Act "promoted competition in the telecommunications market by preventing providers from excluding their competitors' listings from phone books, online directories, and directory assistance databases" is both true and misleading at the same time. It is true in that the 1996 Act created a marketplace for subscriber lists, as we see in the *LSSi v. Comcast* case.[11]

It is misleading inasmuch as it creates the impression that sharing of subscriber lists was mandatory. The sharing itself was not mandatory, but once the carrier made the

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[8] Comcast Brief, at 8.

[9] In the 1999 FCC decision cited by Comcast, the Commission stated "Our rules, however, also prohibit a LEC from providing access to those customers' unlisted telephone numbers, or any other information that the LEC's customers have asked the LEC not to make available." FCC Third Report and Order, *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of CPNI and other Customer Information,* 14 FCCR 15550, ¶¶ 166-67 (1999).

[10] *See, e.g.,* 47 USC § 222, regarding "Privacy of Customer Information." *See* also discussion below of the *Terracom* case (arguing that section 222 is not limited to Customer Proprietary Network Information (CPNI)), and the *National Cable Television Association v. FCC* case.

[11] *LSSi v. Comcast,* 696 F3d 1114, 1119 (11th Circuit, 2012), *on remand LSSi v. Comcast,* 2013 U.S. Dist. LEXIS 188580 (D. Ga., March 4, 2013), discussed at pp. 13-19 of SED Opening Brief.

decision to license to third parties, the carrier was barred from discriminating among "qualified" third parties – directory assistance providers and directory publishers.[12]

This means that once Comcast made the decision to enter this marketplace, and license its directory listings to one third-party, then it was required to provide those listings to all – phone books, online directories, and directory assistance databases. *This vastly increased the potential exposure of inadvertently released non-published subscriber information*. Comcast then doubled down by putting its directory listings online.

Data security became the key issue. And it raised two related questions: (1) would Comcast devote the resources to provide adequate security, and handle data security problems as they arose?; and (2) would consumers receive any notice about how Comcast was using their data? The answers appear to be "no" and "no." As one commenter recently observed about online businesses' collection of consumer data:

> Investment in security is entirely in the hands of the business – which has little incentive to invest the substantial resources necessary to protect consumer information. Consumers, in turn, have little ability to determine what security is adequate or whether businesses are complying with security rules.[13]

Not included in Comcast's description of the regulatory background is any acknowledgement of the heightening concern about personal privacy in the era of big data.[14] Comcast also seeks to portray the decision to move its directory listings online as

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[12] The FCC promulgated a rule requiring a carrier like Comcast to provide non-discriminatory access to its subscriber lists *if* it provides any access at all. None of this blocks the ability of a carrier to audit what downstream uses of its carrier lists the publisher or DA provider is actually making FCC Third Report and Order, *supra; see also* Order on Reconsideration, *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of CPNI and other Customer Information,* 19 FCCR 18439 (2004) at ¶ 18 carriers may bring a civil action for breach of contract if directory publishers misuse subscriber list information. The prospect of such suits should help deter entities from misusing subscriber list information obtained pursuant to section 222(e).

[13] Hoofnagle & Whittington, "Free: Accounting for the Costs of the Internet's Most Popular Price," 61 UCLA L.REV. 606, 611 (2014).

[14] *See* FTC, GAO, and Senate Commerce Reports cited in staff's Opening Brief, at 8, fn. 24; *see also* Report of the Office of the President, *infra.*

motivated by a concern for the environment,[15] but in fact more directory pages may be printed today than before carriers divested themselves of this responsibility.[16]

B. Procedural: Comcast Unilaterally Rewrote the Joint Briefing Outline, Skipping Over Issues Like Its 28 Month Delay in Discovering the Breach

At the Assigned ALJ's request, the parties prepared a Joint Briefing Outline, and provided it to the Assigned ALJ.[17] The ALJ thanked the parties.[18] Comcast then ignored the Outline, omitting two of its major categories, and two of its minor categories in its Opening Brief filed on November 4, 2014. Comcast simply skips section III.E, the question jointly agreed on by the parties, "Could Release have been discovered Earlier?"[19] While SED expected Comcast to put its own spin on these categories, it did not expect Comcast to ignore them altogether. Comcast's failure to address these issues in its Opening Brief, leaves Comcast able to assert new facts and/or arguments for the first time in its Reply.

Comcast admits that it has "collapsed" categories, but offers no explanation for this: "For the most part, Comcast's headings identically track those in the approved outline, but in a couple of instances, Comcast collapsed separate subheadings into a single subheading to improve readability."[20] To the extent that Comcast raises substantially new arguments, or as requested by the Assigned ALJ, SED stands ready to provide further briefing. Comcast's omission of these headings also has the effect of throwing the

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[15] Comcast Brief, at 8 and fn. 24.

[16] "Phone Book Publishers Lag in Environmental Responsibility, PSI Says," Environmental Leader" (August 13, 2014), a report of Environmental & Energy News on analysis of nonprofit Product Stewardship Institute, available at http://www.environmentalleader.com/2014/08/13/phone-book-publishers-lag-in-environmental-responsibility-psi-says/.

[17] October 17, 2014 email string between the parties and ALJ regarding "Comcast: Joint Briefing Outline 4.0 FINAL"; *see also* Comcast Brief, Appendix 1.

[18] October 17, 2014 email string between the parties and ALJ regarding "Comcast: Joint Briefing Outline 4.0 FINAL."

[19] Comcast Brief, Appendix 1.

[20] Comcast Brief, at 3, fn. 4.

parties' agreed-on briefing out of synchronization.[21] SED will continue to use the agreed Outline, but will prominently cross-reference the corresponding sections of Comcast's Brief.

III. FACTUAL ISSUES

A. Comcast Presents the History of the Breach in Three Paragraphs Which Do Not Adequately Explain What Happened and Why (Comcast Section A)

Comcast narrates the data breach in three paragraphs, portraying it as "an anomaly in a data extraction process."[22] Comcast's narrative leaves out the problematic parts.[23]

Comcast locates the failure mechanism in the POI Table, and a "default" setting of published.[24] Comcast's short description of the breach omits any reference to the more reliable PAS Table, however, which by all appearances was used for billing.[25] What is clear is that all customers were billed for the entire duration of the breach.[26] Indeed, as Ms. Donato testified, the December 2012 "fix" for the "Process Error" was to query the PAS Table rather than the POI Table in order to put the "privacy flag" on the non-published directory listing records.[27] Her prepared testimony makes the matter even clearer:

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[21] While Comcast's actions appear intentional, SED has unintentionally contributed to the problem with its ongoing formatting problems. The Table of Contents was generated with two sections III.B, thereby rendering the remaining numbering in section III incorrect. That will also be noted below.

[22] *Id.* at 11-13.

[23] *Compare* SED Brief at 22-29.

[24] Comcast Brief at 12 ("the process searched the POI Table using the customer's *new* account number, did not find a non-published service order based on that account number, and defaulted the listing to published …")

[25] Both versions of the distribution chart in the record – Exhibit COM 114C (Ms. Donato's markup of Mr. Christo's initial chart); Exhibit SED 15C (Ms. Donato's markup of Mr. Christo's finished chart, also attached without Ms. Donato's markings as confidential Appendix 2 to SED Opening Brief) – show the PAS table being used to generate customer bills.

[26] Donato Deposition transcript at 93:25-94:2, found at Exhibit SED 6C, Christo Rebuttal, **Attachment A.**

[27] HT (Donato) at 473:5-11; *see also* HT (Donato) at 396:2-6, 408:2-18, where Ms. Donato offers this, referring to Exhibit COM 114C:

(Footnote continued on next page)

> Comcast revised the query process to draw non-published codes from a different data source (the PAS Table) that has been tested and proven to be more reliable than the original data source the POI Table.[28]

Comcast never explained why it used different data sources for billing and for service provisioning.

Nor does Comcast's Brief explain why it continued to use multiple systems for service provisioning, systems that appear to have fallen into two general types: one that involved periodic "refreshes," used for Targus and Frontier; and one that involved transferring service installation and change orders on a more "real time" basis, used for the ILECs and LSSi – a fact referenced in Comcast's testimony but not in its Brief.[29]

A close reading of Comcast's Brief reveals that, while there may have been a major "Process Error," there were a handful of different releases of data, to Frontier, to Targus, and from Targus to kgb, all on different dates, all of which could have been stopped had anyone performed a "spot check" or used even rudimentary data security procedures.[30]

Comcast's telling also omits that there were other errors and other breaches during this time.[31] Indeed, Comcast claims that its systems are national in scope,[32] and evidence

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> As part of the correction and for -- research and the correction, is we changed the source of this query in DLODS from the POI Table to the POD [PAS] table which is 4 on this chart. We believe that is a better 7 data source for what we are looking to do is 8 fully directed to the indicator.

(The Hearing Transcript here incorrectly refers to a POD table when "4 on this chart" (COM 114C) is clearly the PAS Table. This is an error in the Hearing Transcript not noted in SED's previous list of Errata (Opening Brief Appendix 4). Ms. Donato's prepared Direct Testimony quoted above is clear on this issue.

[28] Exhibit COM 103, Donato Direct, at 26:17-20.

[29] *Compare* Exhibit COM 103, Donato Direct, at 7-8, and 25:20-24 (periodic "full data refreshes" to Targus/Neustar; see also 8:2-5, describing apparently periodic transmissions to Frontier); *compare id.* at 8:14-28 ("real time" deliveries for ILECs and same day delivery for LSSi).

[30] *See* chart, Exhibit COM 104, Donato Rebuttal, at 7.

[31] *See* SED Opening Brief at 28-29, quoting Ms. Stephens ("Even those tickets specifically relating to publication of non-published listings … would not have presented a 'warning sign' of the Process Error

(Footnote continued on next page)

seeped out in Comcast's Rebuttal Testimony and at hearing that there were breaches in other states, if not in California.[33] One major breach was discovered at about the same time Comcast allegedly discovered the "Process Error."[34] Other breaches were documented in 2009.[35] Indeed, breaches of non-published numbers at Comcast appear to have been an ongoing and recurring, if not a constant, fact of life.

Comcast's telling of the privacy Breach has seemed to evolve. Ms. Donato's Direct Testimony asserted that "the change in customer's account numbers had the effect of 'masking' some of the Non-Published Listing information associated with customer's prior account numbers."[36] Ms. Donato's Rebuttal states that the problem was a "default [of] the telephone number to published status in DLODS."[37] The failure of the query to reverse the "default" then led to the failure to include the proper "privacy flags" when Comcast shipped directory listings off to Frontier and Targus (and through Targus to kgb).[38]

B. The Full Extent of the Breach – How Far the Non-Published Numbers Traveled - May Never Be Known; Comcast's Brief Obscures Rather than Clarifies this Issue (Comcast Section B)

"Unaware of the flaw in its data extraction process," it writes, "Comcast unknowingly provided files that did not accurately reflect the non-published status of

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unless they were opened for customers who were impacted by the Process Error").

[32] *See e.g.,* HT (Donato) at 394:8-9 ("the process to extract data listing data is a national process").

[33] Thus, the Comcast Director who complained that his non-published listing appeared online "was not related to the Process Error." Stephens Rebuttal, at 12:9. California customer John Doe 9, a non-published customer whose name appeared in an online directory, similarly "was actually not affected by the Process Error. *Id.*, at 28. *See* further evidence of other breaches in California, at SED Opening Brief page 28-29.

[34] Donato Deposition at 205:1-18; *see also* Exhibit SED 5C, Christo Rebuttal, at 7, text accompanying footnote 24, and **Attachment G.**

[35] SED Opening Brief at 27-28.

[36] Exhibit COM 103, Direct Testimony of Lisa Donato at 3:16-18.

[37] Exhibit COM 104, Rebuttal Testimony of Lisa Donato at 5:2-3.

[approximately 75,000] customer listings," and provided these listings "to two entities: (1) Frontier Communications, Inc., ('Frontier') and (2) Neustar [aka Targus] ... "[39] Frontier then used the listing information in its phonebooks for two "regional printed directories," one in Elk Grove and one in Colusa County.[40] Targus/Neustar distributed the "non-published listings back to Comcast for publication on Ecolisting," and "a subset of the non-published listings" to kgb and Plaxo.[41] Apart from a few "test files" that were allegedly never used, this (according to Comcast) is the complete universe of parties that received the non-published listings.[42]

There are a number of problems with this narrative. The first is Jane Doe 10, one of the Affected Customers (Comcast has verified that she was one of the victims of the "Process Error"). She clearly testifies that she was in the Valley Yellow Pages directory for Sacramento – a publisher and area not specified by Comcast.[43] How did that happen?

It appears that Frontier uses a company named DataLink to facilitate directory publishing.[44] Datalink's website (which Comcast counsel partially read into the record) states that "Data Link Solutions, Inc. provides data feeds … to telephone directory publishers throughout North America for their in-house publishing systems."[45] We may never know the full extent of the distribution. But, we have concrete proof that Comcast's universe of directory listings recipients is unreliable and incomplete – Jane Doe 10's testimony, and her photograph of the Sacramento Yellow Page directory in

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[38] *Id.* at 5:5-8.

[39] Comcast Brief, at 13.

[40] *Id.*

[41] *Id.* at 14.

[42] *Id.* at 15 ("There is no evidence that the non-published listings were distributed to any other party").

[43] Jane Doe 10 Declaration, **Attachment B** to Momoh Rebuttal, Exhibit SED 3, at ¶ 8 and Exhibit C.

[44] HT at 212:2-220:21, and 213:5-6 ("I believe DataLink is a company that provides data to phonebook publishers").

[45] HT at 219:23 ("frontier@datalinkontheweb.com"); *compare* www.datalinkontheweb.com from which the quote above was taken.

which her non-published listing appeared, bear mute witness to that. We know that DataLink received Ms. Jane Doe 10's subscriber listings from Comcast.[46] The question is to what *other* "telephone directory publishers throughout North America" (potentially including online publishers as well) DataLink may have provided those listings.

Moreover, the phonebook in which Ms. Doe 10's telephone listing appeared directly contradicts Ms. Donato's testimony that Supermedia and Valley only received "test files" and that Targus/Neustar "never licensed or sold the files to these entities."[47] Yet, there is Ms. Doe 10's listing in the Valley Yellow Pages for Sacramento.[48]

Another and bigger problem is the distribution to and through kgb. Comcast now suggests that Targus/Neustar "distributed a subset of the non-published listings to two other parties," kgb, Inc (shown as kgb USA, Inc. in the contracts) and Plaxo, a Comcast affiliate.[49] There is no suggestion of "subset" in Comcast's earlier descriptions of the Breach to kgb. Ms. Donato's Opening Testimony asserts:

> Comcast recently discovered through Neustar that in 2010, Neustar submitted Comcast directory listing data to Comcast's directory assistance vendor kgb/InfoNXX ("kgb"), which may have included the Non-Published Listings. Kgb informed Comcast that it used the Comcast data from Neustar only in limited circumstances. Comcast requested that Neustar terminate the agreement with kgb effective October 1, 2011 and requested destruction or return of the data.[50]

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[46] Jane Doe 10 Declaration, **Attachment B** to Momoh Rebuttal, Exhibit SED 3, at ¶ 8 and emails attached as Exhibit C, including "22 Jun 2012" email at 1 ("Per Data Link your listing information came to them on a file from Comcast"); *see also* Declaration at ¶ 8, ¶ 11 (I received a letter [from Comcast] informing me that my telephone number had been released").

[47] Exhibit COM 104 at 9:5-10; *see also* Comcast Opening Brief at 15 ("Neustar confirmed with the third parties that these teset files were never used and were subsequently destroyed").

[48] Exhibit SED 3, Momoh Rebuttal, at Attachment B, Jane Doe 10 Declaration at ¶ 8 and Exhibit C.

[49] Comcast Brief at 14.

[50] Exhibit 103, Donato Direct, at 22-23.

Ms. Donato's Opening Testimony cites to no documentation for any of this.[51] Her Rebuttal Testimony provides a variation on this narrative:

> *** [redacted] .*** *See* Comcast/Donato Rebuttal Exhibit D (Neustar Declaration). kgb then executed a license with Neustar to receive Comcast's directory listings in ***November 2010*** (with test files received in July 2010) and received the listings until either October 2011 or January 2012. *See* Comcast/Donato Rebuttal Exhibit E (kgb contract, schedule 1, and amendment). kgb deleted all Comcast sourced directory listings in the last week of January 2012.[52]

This, of course, was written before SED secured the testimony of the author of the "Neustar Delaration," Steve Chudleigh.[53] The cross-examination of Mr. Chudleigh revealed that the DLP file was not a ***"[redacted]"*** but a Directory Listing Premium file, which in fact did "incorporate" Comcast directory listings.[54] Mr.

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[51] *Id.* Ms. Donato drops a footnote 4, indicating that kgb claimed it only used the Comcast data "via 411 calls made by kgb directory assistance customers which [sic] reached a live agent," as opposed to an automated response platform that "did not provide residential listings," but no documents are cited.

[52] Exhibit COM 104C, Donato Rebuttal Testimony, at 8-9 (emphasis in original), *citing* "Comcast/Miller Rebuttal Exhibit D (kgb answers email)."

[53] SED asked Comcast to voluntarily produce him at hearing, and when Comcast declined, SED sent a process server to his house on a Saturday morning before the hearings to serve him with a subpoena in this matter. *Cf.* HT 250:2-9, 252:13-17.

[54] *Id.* at 270:16-22, Exhibit SED 7C, at COMCAST_POST-OII_ 001293; see also Exhibit SEC 6C, Christo Rebuttal, at **Attachment W** (Mr. Chudleigh reports that Comcast data, ***"[redacted]"***). Thus, the documents and Mr. Chudleigh's hearing testimony appear to *directly contradict* the statement in Mr. Chudleigh's Declaration that "Neustar does not incorporate Comcast-sourced subscriber DL Records into its Directory Listing Premium (DLP) product." *Compare* Exhibit COM 104, Donato Rebuttal, at **Attachment D,** ¶ 5.

Chudleigh also confirmed that Comcast listings were used to "corroborate" DLP, the contents of which included a commercially available Neustar database, PCP.[55]

Comcast's Opening Brief contains no discussion about what Targus/Neustar did with the Comcast-provided data, other than provide it to Ecolisting, and to kgb and Plaxo. It is also much more truncated in its description of kgb's receipt of the non-published listings, covering this in one sentence: "Neustar [Targus] distributed non-published listings in November 2010 to kgb, Inc. ("kgb"), Comcast's directory assistance (i.e., 411 provider), which received the data for its live 411 operator service until late 2011/early 2012."[56] The only source for the assertion of limited use is the largely discredited email exchange between Phil Miller and a kgb employee, created one week after Mr. Miller's deposition.[57]

The evidence suggests not only that Comcast has not provided the full story about what Targus/Neustar did with the non-published listings, but that kgb also could have been a portal to a much broader distribution of the non-published numbers. Early Comcast documents talk about kgb as itself a sub-licensor of Comcast data to *other* third parties.[58] When Targus affiliate Localeze licensed the Comcast-provided subscriber information to kgb, it specifically gave kgb rights to use the listings for kgb's own website and online directory, www.kgbpeople.com.[59] This again exposed the non-

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[55] *See* SED Brief, at 33-35. The testimony recited there also throws into question Mr. Chudleigh's assertion that "Neustar does not create data broker profiles for the DL Records of Comcast customers." **Attachment D,** ¶ 5. Even if Neustar did not "create data broker profiles" for Comcast customers, its appears to have used Comcast information to "corroborate" or true up information already in its databases.

[56] Comcast Brief, at 14.

[57] Exhibit COM 107C, Miller Rebuttal Testimony, **Attachment D**.

[58] *See* SED Opening Brief at 61, *quoting* from Exhibit SED 105C, Christo Opening Testimony, **Attachment L** (July 2009 email string), at COMCASTPOST-OII_001878 (*** [redacted] "***).

[59] Exhibit COM 104C, Donato Rebuttal Testimony, **Attachment E** (Localeze/Targus contract with kgb, including Amacai Product Schedule, COMCASTPOST-OII 011216 (7th page before end of Attachment), at ¶ 3 [*** [redacted] "***]); SED Opening Brief at 37-38, citing

(Footnote continued on next page)

published numbers to a further world of distribution. We see this reflected in a bill stuffer, apparently from 2011, announcing Ecolisting: "Your information may also appear in other online directories and directory assistance (411) databases, as well as printed directories."[60]

C. The Duration of the Breach Was Likely Longer Than Comcast Admits (Comcast Section B)[61]

Comcast conflates the question of duration with that of the extent of dissemination, in one of its many departures from the Briefing Outline. Its abbreviated discussion of duration focuses on the "discovery" of the Breach, i.e., when it "first identified" the Breach.[62] This distracts from the question of when the Breach began, to which Comcast's Opening Brief assigns no fixed date. Comcast now presents the scenario of many individual breaches, each with different start times and end dates, although all allegedly caused by the "Process Error." Thus, the releases to Frontier, Targus, and kgb – the three most significant breaches – all occurred on separate dates.[63]

Comcast's Brief does not address at all SED's contention that the Breach may have begun prior to July 1, 2010, even though its Rebuttal Testimony does.[64] Its testimony, for instance, admits that a "full data refresh" went to Targus on February 2, 2010, the first "full data refresh" sent after the reassignment of numbers which triggered the Process Error, and the last before the July 1, 2010 Ecolisting launch.[65] Logically, that full data

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Exhibit SED 6, Christo Rebuttal, at 9, fn 37 and accompanying text, and **Attachment J** (screenshots from www.kgbpeople.com). Targus/Neustar also dis business under the names Localeze and Amacai.

[60] Exhibit SED 1, Staff Report, at **Attachment 19**.

[61] This section should have been "C" in SED's Brief, and instead, due to a formatting error, appeared as a second section "B."

[62] Comcast Brief at 15.

[63] *See* Comcast Brief at 13-14; graphically displayed in Donato Rebuttal, at 7 (Exhibit COM 104).

[64] Donato Rebuttal, at 8.

[65] Donato Direct, at 25:20-21.

refresh included non-published numbers.[66] The question is to whom Targus may have sublicensed the data in early 2010.

We know that Targus' affiliate Localeze entered into a contract with kgb in 2009. Although Comcast will claim that the initial purpose of that contract was business listings, it is clear that at some point the contract was used to funnel both Comcast and ***[redacted]*** directory listings to kgb, and indeed ***[redacted]"*** alike.[67] A more difficult problem for Comcast is a 2009 email string, where Comcast employees discuss sending directory listings to kgb.[68]

The other end of each of the data breaches is also problematic. Comcast claims that it required Targus to terminate its contract with kgb, with the last transmissions of Comcast data occurring in January 2012.[69] This, however, remains murky, as the termination was done not for business reasons but to present a certain appearance in the *LSSi v. Comcast* litigation.[70]

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[66] *See* Timeline, Appendix 1 to SED Opening Brief.

[67] Exhibit COM 104C, Donato Rebuttal, at **Attachment E,** Localeze/Targus contract with kgb, including Amacai Product Schedule, COMCASTPOST-OII_011216 (7th page before end of Attachment), at ¶ 2. *See also* https://www.neustarlocaleze.biz/directory/index.aspx.

[68] *See* SED Brief, at 27-28.

[69] *See* Exhibit COM 104C, Donato Rebuttal Testimony, at 8-9.

[70] *See* SED Brief, at15-18. Further evidence of the real reasons for the kgb termination are found at Exhibit COM 104C, Donato Rebuttal Testimony, Attachment K (Steve Chudleigh to Neustar General Counsel, June 11, 2014 [redacted]."***] SED cites this only for the pretextual nature of Comcast's termination (through Targus) of kgb. Mr. Chudleigh clearly has his facts wrong, even by Comcast's present accounting. The deal to provide kgb with Comcast data lasted, even by Comcast's telling, for over a year. *See* Donato Rebuttal, at 7. The important fact here is that *Phil Miller knew that kgb was being supplied with Comcast-provided data*, -- see Third Declaration in the Georgia litigation – **Attachment K** to Christo Opening Testimony -- and was able to tell the Georgia Court this (under oath) in April 2011, squarely in the middle of the breach period. Moreover, there is evidence that strongly suggests that Comcast was sending kgb data directly in 2009. *See* Opening Brief at 61. Indeed, kgb was no stranger to Comcast, having provided Comcast with Directory Assistance service since the 2003. Christo Rebuttal, at 10-11. The notion that Comcast or its attorneys would have to "ask" Chudleigh or others at Targus/Neustar whether they had ever given Comcast data to kgb or anyone else can only be seen as the attempt to create an alibi.

The Breach through Frontier is not murky. It clearly continued through the middle of 2013, as manifest by the declarations of John Doe 9 and Jane Doe 10, both of whom had their names in 2012-2013 directories in Frontier territories.[71]

Of course, in many respects, the data Breach continues to this day. Witness Jane Doe 11 testified that she still finds her non-published data on the Internet.[72] As noted above, once it hit the Ecolisting website, the non-published data was essentially available to anyone on the Internet. It now appears that non-published data was likely shipped to and used on another website, kgbpeople.com.

D. Comcast's Brief Talks Only of the Discovery of the Breach, Not What Occurred During the 28 Months Prior to the Breach (Comcast Section C)

Comcast asked for a separate section on "Discovery of the Release," which was then placed in the Joint Briefing Outline, only for Comcast to "collapse" it into a previous section.[73] The more important question is barely discussed: how the two October 2012 Trouble Tickets differed in any significant way from the hundreds of Trouble Tickets that came before them, and the many documented other warning signs (i.e., other incidents of non-published numbers being published) that occurred prior to October 2012. SED addresses this in the next section.

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[71] *See* Exhibit SED 2, Momoh Opening Testimony, **Attachment P.9**; *see also*, Exhibit SED 3, Momoh Rebuttal Testimony, **Attachment B** (Exhibit C).

[72] HT (Jane Doe 11), at 159-160; *see also* Exhibit SED 2, Momoh Opening Testimony, **Attachment P.11** (Declaration of Jane Doe 11).

[73] *See* Comcast Brief, Appendix 1.

E. Comcast's Brief Declines to Address the Question of Why It Took 28 Months to Discover the Main Privacy Breach (Section Skipped)[74]

Although featured in SED counsel's September 24, 2014 email exchange with the ALJ regarding issues at hearing,[75] highlighted in SED's Opening Statement and testimony,[76] and listed in the Joint Briefing Outline,[77] Comcast's Opening Brief skips Briefing Outline issue III.E ("Could the Release have been discovered Earlier?"). A response to this question would have informed the Commission as to why it took Comcast approximately 28 months to discover a breach of 75,000 customers' private information. Indeed, this issue was of specific concern to the Commission when it issued the OII, noting that "[i]t is difficult to understand how or why Comcast was not alerted to its error much sooner."[78] Despite this apparent notice, Comcast's only discussion of this issue is in section III.C of its Brief, at page 16, where it recapitulates the "needle in the haystack" arguments concerning customer complaints asserted by Ms. Stephens.

Comcast first seeks to deflect these complaints, saying it "focused [on] addressing these customers' individual concerns and correcting the status of their listings," apparently as opposed to doing any root cause analysis, or having a process in place to

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[74] This section should have appeared as section "E" in SED's Brief, but due to a formatting error appeared instead as section "D." As per Comcast Opening Brief, Appendix 1, Comcast skipped this section altogether, although there are two paragraphs on page 16 of Comcast's Brief that address the issue in passing.

[75] September 24, 2014 email from SED counsel, on behalf of all parties, to ALJ Burcham ("Why didn't Comcast catch it sooner?").

[76] September 30, 2014 SED Opening Statement, at 1 ("whether Comcast knew or should have known before their stated discovery of the 'process error' that a data breach had occurred"). The signature page of SED's Opening Statement is incorrectly dated September 19, 2014; *see also*, *e.g.*, Exhibit SED 2, Momoh Opening Testimony, at 40-43 (discussion of customer complaints as early warnings signs); *see also*, *e.g.*, Exhibit SED 5, Christo Opening Testimony, at 31-35 (discussion of how Comcast ignored early warning signs); *see also*, *e.g.*, Exhibit SED 6, Christo Rebuttal Testimony, at 19-21 (discussion of how Comcast could have prevented the breach and should have detected it sooner).

[77] October 17, 2014 email exchange, and Appendix 1 to Comcast's Brief ("could the breach have been discovered earlier?").

[78] OII, at 17.

connect the dots between complaints.[79] Apparently, Comcast did not do a very good job at this, as multiple consumers report calling Comcast multiple times, sometimes separated by a year or more.[80]

Comcast's answer to the question whether the Breach could have been discovered earlier is – apparently – that the numbers of customers complaining about publication of non-published subscriber information "was extremely low in proportion to the overall volume of customer care calls Comcast received and trouble tickets it opened for California customers."[81] SED concedes that the flood of consumer complaints that Comcast regularly receives might have dwarfed the smaller number of customers complaining specifically about non-published issues.[82] How many called? We'll never know, but the evidence we have is: 76 "CR" Trouble Tickets from 2010 through 2012 that Comcast admits were related to the "Process Error"; at least 39 pre-October 2012 contacts from the 760 "escalated" California customers who also had called the customer hotline after the January 2013 notification; an estimated 770 total California customers who contacted Comcast before discovery of the Breach (based on CSG notes).[83]

The trouble tickets are in a different category than mere customer service (CSG) notes. Trouble tickets are, by definition, customer complaints that customer care representatives thought warranted follow-up. Comcast reported that it had received hundreds of trouble tickets with one specific trouble ticket code related to the publishing of non-published numbers.[84] We do not know how many other trouble ticket codes might

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[79] Comcast Brief, at 16.

[80] *See, e.g.,* Exhibit SED 3, Momoh Rebuttal Testimony, **Attachment B** (Declaration of Jane Doe 10, at ¶¶ 4-5). Indeed, many of SED's Declarants report multiple calls to resolve their problem. *See,.e.g.,* Exhibit SED 2, Momoh Opening Testimony, **Attachment P.1** (Declaration of John Doe 1, at ¶¶ 5-7) and **P.3** (Declaration of Jane Doe 3, at ¶¶ 5-8).

[81] Comcast Brief, at 16.

[82] *Compare* http://www.consumeraffairs.com/cable_tv/comcast_cable.html?page=1 (81 pages of complaints); http://comcast.pissedconsumer.com/; Exhibit SED 1, Staff Report, at 13-17.

[83] See Exhibit SED 3C, Momoh Rebuttal Testimony, at 14-16; *see also* SED Brief, at 44.

[84] Exhibit SED 2C, Momoh Opening Testimony, **Attachment G** (data request responses), at 9 (for the

(Footnote continued on next page)

have related to the publication of non-published subscriber information. Of those hundreds, *Comcast concedes that 76 related to the privacy Breach here at issue.*[85]

The key question is why these 76 trouble tickets, or the Sacramento KCBS report on a Comcast Breach in February 2012, or the experience of a Comcast Director seeing his own non-published number online (to say nothing of the CSG notes and Internet complaints), were not sufficient to trigger some "root cause analysis." See Timeline attached as Appendix A to SED's Opening Brief. Or, put differently, what was different about the two October 2012 trouble tickets that *did* trigger a "root cause analysis"? Neither Ms. Donato nor Comcast have answered the question of how the two October 2012 Trouble Tickets differed in any way from the many Trouble Tickets that had gone before.[86]

Even assuming this minimal number to which Comcast concedes, the question is whether Comcast had any tools to connect the dots. Apparently it did. SED's Opening Brief describes the "Do you know if" email string, that referred to audits of non-published numbers back in 2009.[87] There were also very detailed escalation procedures for complaints about leaks of non-published subscriber information, apparently from roughly the same era.[88] One explanation is that Comcast simply did not devote sufficient diligence or resources to protecting its subscribers' privacy (a lack of investment, as suggested above).

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period January 1, 2010 through October 31, 2012, "Comcast unidentified ***[redacted]*** unique customer accounts, which had tickets with this issue code ***[redacted]***").

[85] Exhibit COM 106, Stephens Rebuttal Testimony, **Attachment H**.

[86] *See generally* HT (Donato) at 483-489, and in particular questions at 485:3-6, 485:23-25, and 486:9-11, and 486:16-20. Neither Ms. Donato nor Comcast have ever answered about the reason the October Trouble Tickets caused a "root cause analysis" when earlier Trouble Tickets had not.

[87] SED Brief, at 28, *citing* **Attachment GG** to Christo Opening Testimony, Exhibit SED 5C (at 13721).

[88] Exhibit COM 106, Stephens Rebuttal Testimony, at **Attachment B** (NCAR Procedures, mentioning ***[redacted]***, the previous name of kgb).

F. Comcast's Discussion of its "Fix" Fails to Explain Why it Did Not Use Its *Online Site Removal* Process

The parties agreed that they would address the issue of Comcast "Fixing the *Release*/Deleting the Listings" in this section.[89] Indeed, Comcast had insisted on this section, but now moves and truncates the discussion on this point.[90] In its Brief, Comcast narrowly frames the issue in terms of fixing the "Process Error," and moves it into section D.[91] Here is the whole of what Comcast says about this issue:

> Comcast personnel acted quickly once the Process Error was identified. By mid-November 2012, the XFINITY Voice product team and Comcast software engineers determined that the query to the POI Table was the root cause of the Release that led to the two October 2012 complainants' non-published numbers being published. The engineers designed, tested, and implemented a revised directory listings extraction process, so that Comcast could send a corrected file of listings to Neustar by December 5, 2012. Comcast also instructed Neustar to stop sending listings to publishers, and requested that it recover any recently-sent listings from publishers. All non-published listings from the data feed to Neustar and Ecolisting were deleted by December 10, 2012, within a few days from when Comcast sent the corrected listings to Neustar. In addition, Comcast asked Neustar to identify all entities that had received the listings and required that all such listings be destroyed.[92]

As a threshold matter, Comcast's one paragraph explanation discloses that when Comcast "deleted the [non-published] listings," it is referring to a process by which

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[89] *See* Comcast Brief, Appendix 1, at 2 (emphasis added). SED's Opening Brief inadvertently labeled this as section E.

[90] *See ibid* (compare the Joint Outline issue III.F. ["Fixing the Release/Deleting the Listings"] with Comcast's modified brief outline ["Once the Error was Identified, Comcast Promptly Fixed it and Deleted the Listings"]).

[91] *See ibid*.

[92] Comcast Brief, at 17 (citations omitted).

Targus/Neustar was to delete the listings; there is no evidence that Comcast ever audited Targus/Neustar (or Frontier or kgb for that matter) to ensure compliance.[93]

The more important point here is that Comcast's briefing strategy allows it to avoid articulating a defense (to which SED and Intervenors could reply) to allegations raised by SED in testimony concerning Comcast's failure to follow its *own* existing complaint resolution process of "Online Site Removal."[94] (Comcast's other remedial failures are discussed in section III.H, *infra*.)

In other words, Comcast limited its "deletions" to Ecolisting.com, even though it informed affected customers that third parties could have obtained their confidential information once it was published there.[95] This is particularly egregious because Comcast knew of specific, popular, third party websites (e.g., whitepages.com, anywho.com, google.com, msn.com) that – through whatever unknown contractual or operational or third-party action – could have posted Comcast subscribers' listings once they had been published in error, as had been done here.[96]

SED sets out these websites and Comcast's existing procedures to delete errant non-published listings from these sites, at pp. 77-79 of its Opening Brief. Comcast's failure to address this issue in its Opening Brief is also remarkable in light of the testimony it elicited from Ms. Stephens at hearing – over SED objections, to be sure – that there had been a change of procedure at these apparently unaffiliated websites.[97]

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[93] *Ibid*.

[94] *See* Exhibit SED 106, Christo Rebuttal Testimony, at 38-40; *see also* SED Brief, at 77-79.

[95] *See* Exhibit SED 2, Momoh Opening Testimony, **Attachment P.8** (Declaration of John Doe 8, Exh. 1); *see also* SED Brief, at 66-70 and 77-79.

[96] *See* SED Brief, at 77-79.

[97] HT (Stephens), at 534:8-535:20. Had Comcast wanted to introduce this new evidence to counter Mr. Christo's Rebuttal, the parties had agreed to a "15-hour rule," but Comcast chose to surprise staff at hearing, which was the source of SED's objection. Rather than attempt to introduce the Intelius Listing Removal Process materials over SED's objection, as it did with much other evidence, Comcast simply withdrew the proposed Exhibit COM 117. HT, at 616:14.

SED shows how Comcast's apparent new-found claim that it can no longer use the procedures that it has had since 2009, and that are reflected in Trouble Ticket after Trouble Ticket, is inconsistent with its continued use of those procedures through 2013, as described at pp. 68-69 of SED's Opening Brief. Finally, even if whitepages.com, yellowbook.com, and yahoo.com had all changed their policies, as Comcast contends, Comcast made no attempt to legally force such removal or otherwise force the issue, as Cox had done thirteen years earlier by filing a motion for a temporary restraining order (TRO) requiring Pacific Bell to stop distributing White Page directories containing Cox's non-published customers.[98]

Even assuming *arguendo* that Comcast could not delete customers' listings from third party websites, it is troubling that Comcast failed to provide affected customers with this helpful list of third party websites that it had already compiled for its customer service representatives.[99] Comcast's compilation of these third party websites and its *Online Site Removal* process establishes Comcast's awareness that third parties would have likely accessed the non-published numbers from Ecolisting.[100] The notification letter would have been the most logical opportunity for Comcast to be specific about this known consequence. Instead, Comcast chose to be vague in its notice to customers, admitting only that: "We recently became aware that your XFINITY Voice telephone number was inadvertently published in our online directory, Ecolisting.com, through which a third party publisher could have obtained your information."[101]

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[98] Resolution T-16432, Finding 14.

[99] *See* Exhibit COM 106C, Stephens Rebuttal Testimony, **Attachment B** (NCAR Methods and Procedures for Directory Listings).

[100] *See* Exhibit SED 2, Momoh Opening Testimony, **Attachment P.8** (Declaration of John Doe 8, Exh. 1); *see also* Exhibit SED 5, Christo Opening Testimony, **Attachment A** (Comcast Customer Privacy Notice, at p.6 or COMCAST_AG_000672); *see also* SED Opening Brief, at 66-70.

[101] *See*, *e.g.*, Exhibit SED 2, Momoh Opening Testimony, **Attachment P.8** (Declaration of John Doe 8, Exh. 1).

Comcast's failure to conduct even the most rudimentary search and delete effort, as outlined in its *NCAR Methods and Procedures for Directory Listings* guidelines[102] and/or to provide customers with the list of relevant third-party websites was unreasonable.

G. Comcast Baseline Practices, Including Its Disclosures to Consumers, Were Not Just and Reasonable (Partially Addressed in Comcast Section E) [103]

Staff's investigation revealed, and its testimony addressed, at least two areas of Comcast's standard, baseline practice that fail to live up to the "just and reasonable" standard of section 451: (1) Comcast's practice (now apparently discontinued or partially discontinued) of sending non-published subscriber information to third parties, even if those third parties are characterized as "designated agents";[104] and (2) Comcast's failure to fully and meaningfully disclose the reality of non-published service as well as other means for customers to protect their privacy. Because the parties so agreed, SED will discuss these in reverse order.

1. Comcast Foregrounds the Fine Print of Its Customer Agreement, Language Most Customers Likely Never Saw, to Defend Its Disclosures (Comcast Section E)

a. The Exculpatory Clauses Buried in the Privacy Notice and Terms and Conditions

Comcast paints a picture of customers who are fully informed about their non-published service, the uses to which customer information is put, and of customers' rights to control that information. Comcast contends that it "clearly advises customers about its policies for its non-published offering: what non-published status is, how it works, and

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[102] See Exhibit COM 106C, Stephens Rebuttal Testimony, **Attachment B** (NCAR Methods and Procedures for Directory Listings); *see also* SED Opening Brief, at 46-49.

[103] Although this was listed as III.G in the joint Briefing Outline, SED's formatting problem defaulted it to III.F.

[104] This was addressed in Exhibit SED 6C, Christo Rebuttal Testimony, at 32-33.

the limitations of such status."[105] Comcast points to statements in its Product Guide, its Privacy Notice, and its Terms and Conditions, and particularly – as SED's Opening Brief anticipated – to the limitations imposed in the fine print of those documents.[106] Comcast relies on two particular limitations, one it had previously disclosed, and a new one found for the first time in its Opening Brief: (1) the "take-back" in the Privacy Notice (after the "ensure" language in the Welcome Kit) that Comcast "cannot guarantee that errors will never occur"; and (2) a new limitation, that its liability "will be limited to the 'CHARGES, IF ANY' that the customer has paid to "NOT PUBLISH THE INFORMATION FOR THE AFFECTED PERIOD."[107]

Comcast puts these words in capital letters, which suggests they were prominently conveyed to the consumer. This is hardly the case. The limiting documents are two: the "Comcast XFINITY Customer Privacy Notice" and the "Comcast Agreement for Residential Service." They are run together as one long skein of fine print in Ms. Donato's Attachment B, with no discernable break other than one small header change, and a change in the footer string (and no testimony claiming they were separated).[108] All of this appears to be in approximately 8 point font, which is delivered to the customer some time around purchase of the service, although Ms. Donato was not clear exactly when that happened.[109] The first document (Privacy Notice) announces in its first line

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[105] Comcast Brief, at 17-18.

[106] *Id*., at 18-19; *compare* SED Opening Brief, at 51.

[107] Comcast Brief, at 18. At no point (of which SED is aware) did Comcast mention that it was relying on the limitation of liability provisions of the terms and conditions, or otherwise provide notice of this argument before November 4, 2014. Indeed, the only mention of the "terms and conditions," on which Comcast now apparently relies for this limitation of liability, is found in Ms. Donato's Direct testimony: "The terms and conditions and related privacy notice are provided to XFINITY Voice customers upon enrollment in the service. These materials indicate that there is a potential for error." Exhibit COM 103, Donato Direct Testimony, at 5:20-2.

[108] Exhibit COM 103, Donato Direct Testimony, **Attachment B**, (Privacy Notice, at pp. B-1 through B-9 and B-10 through B-29, the last several pages of which are entitled "IMPORTANT INFORMATION FOR VIDEO CUSTOMERS.")

[109] SED Opening Brief, at 51-53.

that it is FOR CABLE TELEVISION, HIGH-SPEED INTERNET, AND PHONE SERVICES"; the second document (Service Agreement) does not contain this preface.

In the Privacy Notice, the "cannot guarantee" limitation comes at the end of a section entitled "When may Comcast disclose personal information to others in connection with phone service?" and *after* six bullet points below that heading; it comes right *before* another heading. "When is Comcast required to disclose personally identifiable information and CPNI by law?[110]" No clear distinctions are drawn between these two sections, nor are there any definitions of or distinctions between "personal information," personally identifiable information," and "CPNI" here. (See further discussion below).

In the Service Agreement, the limitation of liability clause (which Comcast attempts to bolster now by a motion of official notice of AT&T and Verizon tariffs[111]) is similarly buried in this mountain of fine print, the readability of which is not improved by the fact that it is all in capital letters:

> **Directory Listings.** IF WE MAKE AVAILABLE AN OPTION TO LIST YOUR NAME, ADDRESS, AND/OR TELEPHONE NUMBER IN A PUBLISHED DIRECTORY OR DIRECTORY ASSISTANCE DATABASE, AND ONE OR MORE OF THE FOLLOWING CONDITIONS OCCURS: (1) YOU REQUEST THAT YOUR NAME, ADDRESS AND/OR PHONE NUMBER BE OMITTED FROM A DIRECTORY OR DIRECTORY ASSISTANCE DATABASE, BUT THAT INFORMATION IS INCLUDED IN EITHER OR BOTH; (2) YOU REQUEST THAT YOUR NAME AND/OR PHONE NUMBER BE INCLUDED IN A DIRECTORY ASSISTANCE DATABASE, BUT THAT INFORMATION IS OMITTED FROM EITHER OR BOTH, OR (3) THE PUBLISHED OR LISTED INFORMATION FOR YOUR ACCOUNT CONTAINS MATERIAL ERRORS OR OMISSIONS, THEN THE AGGREGATE LIABILITY

[110] Exhibit COM 103, Donato Direct Testimony, **Attachment B**, (Privacy Notice, at B-6).

[111] *See* SED's November 14, 2014 Response and Opposition to Comcast's Motion for Official Notice.

> OF COMCAST AND ITS AFFILIATES, SUPPLIERS OR AGENTS SHALL NOT EXCEED THE MONTHLY CHARGES, IF ANY, WHICH YOU HAVE ACTUALLY PAID TO COMCAST TO LIST, PUBLISH, NOT LIST, OR NOT PUBLISH THE INFORMATION FOR THE AFFECTED PERIOD. YOU SHALL HOLD HARMLESS COMCAST AND ITS AFFILIATES, SUPPLIERS OR AGENTS AGAINST ANY AND ALL CLAIMS FOR DAMAGES CAUSED OR CLAIMED TO HAVE BEEN CAUSED DIRECTLY OR INDIRECTLY, BY THE ERRORS AND OMISSIONS REFERENCED ABOVE.[112]

Here, again, we have dense and – for many consumers – impenetrable language, apparently written by lawyers for lawyers, in which Comcast buries significant limitations to its service. As customers consistently testified, at hearing and in their declarations, customers expected privacy when they paid $1.50/month for a non-published number, not Comcast's "best efforts."[113] Comcast's limiting language defeats the expectations of these consumers.

It also raises larger fairness issues. Some have argued that it is bad public policy to allow carriers to charge for non-published service, and legislative attempts have been made to prevent that.[114] If carriers are allowed to charge for the service, it seems that the least they could is actually provide the service. Consumers reasonably expected that they would receive the privacy protection for which they paid.

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[112] Exhibit COM 103, Donato Direct Testimony, **Attachment B** (Residential Service Agreement, at p. 11).

[113] *See* Exhibit SED 2, Momoh Opening Testimony, **Attachments P.1-P.11 (**Customer Declarations); Exhibit SED 3, Momoh Rebuttal Testimony, **Attachment B** (Customer Declarations of Jane Does 6 and 10).

[114] *See* Exhibit SED 11, at 3, "Call Curtis" Transcript ("there's been a push at the state capital several times to try to make it illegal to charge [for non-published numbers]. But it hasn't done anything"); *see also* Lazarus, "Privacy price gouging, courtesy of phone companies," L.A. TIMES (April 14, 2014), available at http://www.latimes.com/business/la-fi-lazarus-20140415-column.html.

b. The Privacy Notice and Terms and Conditions are Confusing at Best, and Do Not Help Consumers Make Informed Choices about Privacy

Comcast claims that the "description of its non-published offering is essentially identical to that of its peers and competitors, including the ILECs."[115] As SED strenuously argued at hearing, what other carriers do or do not do is *entirely irrelevant* to the question of whether Comcast's disclosures were understandable to an average consumer.[116] If a statement or advertising is deceptively incomplete, it is no defense that others in the industry customarily make similar statements.[117]

The hidden disclaimers and limitations discussed above are just one way Comcast's Privacy Notice and Terms and Conditions fail the "just and reasonable" test. The other is their generally confusing nature. This question was explored in the testimony of Nathan Christo.[118] Comcast ignores it in its Opening Brief. How, possibly, is the customer to understand what privacy protections are available to *and* appropriate for her, when (1) Comcast fails to clearly disclose what it in fact does with published numbers, and in some cases with *all* numbers, published and non-published; and (2) when Comcast's Privacy Notice makes either no distinctions, or vague and confusing distinctions, between non-published numbers, CPNI protections, caller ID blocking; address suppression; and do not call lists (federal and Comcast's own).[119] The Privacy Notice references some of these services (not Caller ID, national do not call list, or

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[115] Comcast Brief, at 19.

[116] HT, at 336:16-21 ("What Comcast is saying is, 'Yes we were speeding, but everyone else is speeding too'"); *see generally* HT, at 336-342.

[117] Like other consumer protection and public welfare statutes, and tort law generally, industry practice is not a defense to a public welfare statute. *Chern v. Bank of America,* 15 Cal.3d 866, 876 (1976); *see also People v. Casa Blanca Convalescent Homes, Inc.* 159 Cal. 3d 509, 527 (1984) (rejecting nursing home's defense that other nursing homes also violated standards).

[118] Exhibit SED 5, Christo Opening Testimony, at 4-9.

[119] *Ibid.*

address suppression), but the references melt together into one undifferentiated mass of fine print.[120]

More importantly, what Comcast actually does with numbers – sending non-published numbers to a third party, and the "corroboration" of Targus/Neustar's consumer database with both published and non-published subscriber information – is nowhere disclosed.[121]

The Privacy Notice begins by running together "personally identifiable information" – a concept that applies primarily to cable television programming[122] – with CPNI, a concept that applies only to telephony.[123] This comes in two sentences of fine print at the bottom of page 1 of the Privacy Notice. On page 2, we are told that personally identifiable information includes "your name; service address; [and] telephone number." In that same section, which is one unbroken block of text, we are given "examples of CPNI …" including "location of service" and other technical details of the service. At the bottom of page 2, the Notice states that "CPNI does not include your name, address, and telephone number."[124] Page 6 of the Privacy Notice identifies a new term "personal information," which is not distinguished from "personally identifiable information." At the bottom of *that* fine print section, we read *for the first time* in an "un-bulleted" sentence about "non-published and unlisted numbers" and how Comcast "cannot guarantee that errors will never occur."[125] Further lack of clarity in the Notice is

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[120] *Id*., at 8-9.

[121] *Compare* SED Opening Brief, at 31-36 and 58-64.

[122] *See* 47 U.S.C. §551(c)(2)(C)(ii)(I) (a cable operator may not disclose "personally identifiable information" about a cable subscriber that would "reveal, directly or indirectly, the extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator").

[123] *See* 47 U.S.C. § 222(c).

[124] At page 55 of SED's Opening Brief, staff states that the Privacy Notice "does not clearly explain: whether a telephone number and name (i.e., the Directory of Subscriber List Information) is part of CPNI, or put differently – whether a non-published number falls under CPNI protection or is an additional protection." SED concedes that Comcast makes the statement quoted above, but believes that the disclosure or explanation is far from clear.

[125] Privacy Notice page 6 also bears Bates number COMCAST_AG_000672.

described in SED's Opening Brief, at 54-58, and in the Christo Opening Testimony, at 8-9. No consumer of average education could be expected to understand the Notice.[126]

It is clear customers are confused. Indeed, even Comcast executives are confused.[127] Customers experienced similar difficulties distinguishing between the protections afforded by non-published status on the one hand, and caller ID blocking on the other.[128] Similarly, the distinctions between personally identifiable information and CPNI are less than clear.[129]

At least five pieces of information are missing from, unclear, or buried in the fine print of the Privacy Notice and Terms and Conditions, information that would allow the consumer to make an informed choice about privacy protections: (1) Comcast sends all its directory listings, published and unpublished, to a third party, where they are used to corroborate consumer databases;[130] (2) all published numbers will go to online directories

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[126] At page 119 of SED's Opening Brief, it referred to the Flesch-Kincaid Grade Level index as one way to measure how difficult a text is to understand. The results are then converted into a score that roughly equates with a grade level in the United States. See www.readabilityformulas.com/flesch-grade-level-readability-formula.php.

[127] Exhibit SED 5C, Christo Direct Testimony, **Attachment AA** (customer service rep explains her confusion about whether caller ID setting is affecting a non-published setting [COMCASTPPOST-OII_002860], and Comcast's *** [redacted] *** responds that ***"[redacted]"***) Nowhere (that staff has seen) is this clearly disclosed to customers. *Compare* Cox offer of "Special Privacy Package," where it lists the different privacy products available, discussed at SED Opening Brief, page 80.

[128] *See, e.g.,* Exhibit SED 3C, Momoh Rebuttal Testimony, **Attachment J** (CSG Notes, at COMCASTPOST-OII_011631 ["SUB HAS NON-PUBLISHED ON THE ACCOUNT AND HAD HER NUMBER BLOCKED ON CALLERID, SUB RECENTLY UPDATED HER SERVICES AND NOW HER NUMBER SHOWS UP ON OUTBOUND CALLERIDS"]); *see also* Exhibit SED 2, Momoh Opening Testimony, **Attachment P.7** (Declaration of Jane Doe 7, at ¶¶ 2, 4-6 [customer confusion about and among non-published, "private caller," and Caller ID services]).

[129] The FCC recently clarified that 47 U.S.C. § 222(a) refers to a category of personal "proprietary information" that includes name, address, and telephone number, separate and apart from CPNI. *In re Terracom,* FCC 14-173, *infra,* at ¶ 18.

[130] At the top of page 5 of the Privacy Notice, it says, possibly in reference to this practice, that "[w]e may also combine personally identifiable information, which we collect … with personally identifiable information obtained from third parties for the purpose of creating an enhanced database or business records." This appears to refer to the "corroboration" and "data append" processes discussed in SED's Opening Brief, at 9, although the reference is unclear, however. *See also, e.g.,* Exhibit SED 2, Momoh Opening, **Attachment Q,** online complaints from customers where Comcast uniquely misspelled their

(Footnote continued on next page)

where any third party can obtain them;[131] (3) Comcast cannot guarantee that this will not occur even if the customer pays for non-published number; (4) a clear discussion of the privacy "products," services and protections available to the consumer, and the distinctions among them; and (5) the actions a customer can take – if any – to prevent all sharing of his account information.[132]

Simply put, there could not have been a meeting of the minds because consumers were not fully informed about what Comcast does with consumer data and the limitations of the non-published service.[133] It is likely that the vast majority of non-published customers have no idea of the limitations that accompany what they were purchasing with their $1.50/month; published customers similarly are unlikely to understand to what uses their phone numbers are being put.

2. Comcast Fails to Address Its Standard Baseline Practice of Shipping Non-Published Numbers to Third Parties (Not Addressed)

SED's testimony clearly flagged the issue of Comcast's practice of sending *all* subscriber information, including non-published subscriber information, to third party data aggregators Targus and LSSi.[134] Comcast's Brief does not address this. Rather, in the section designated by the parties to discuss Comcast's policies and procedures *before* and *during* the Release, Comcast slips in a sentence claiming that it had "reasonable

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names, triggering uptick in direct mail addressed to misspelled names; *id*., at **Attachment R**.

[131] This also is perhaps obliquely disclosed, in a way that forestalls full comprehension of what is at stake, in the Privacy Notice (at page 6). *See* Exhibit SED 5, Christo Opening Testimony, **Attachment A**.

> Once our subscribers names, addresses, and telephone numbers appear in telephone directories or directory assistance, they may be sorted, packaged, repackaged, and made available again in different formats by anyone.

Of course, the salient fact missing here is that this effect is multiplied by Comcast's resort to an online directory.

[132] *See also* legal discussion below about the legal insufficiency of Comcast's Privacy Notice disclosures.

[133] *See* SED's discussion of "information asymmetry" in SED Brief, at 19-21.

[134] Exhibit SED 6, Christo Rebuttal Testimony, at 32-33; *see also* SED Brief, at 58.

processes to prevent the disclosure of non-published listings."[135] SED addresses this issue further in section III.I, *infra*.

H. Comcast's Remedial Efforts Were Not Reasonable Because it Could Have Done More, But Deliberately Did Not (Comcast Section F)[136]

Comcast's Brief presents a limited set of facts to support of its claim that "Comcast personnel acted reasonably and expeditiously to identify, notify, provide refunds to, and address the individual concerns of the Affected Customers."[137] As an initial matter, Comcast's Brief fails to address the allegations raised in SED's testimony concerning the low response rate from former customers (10%) to Comcast's notification letters or that Comcast has failed to provide *any* refunds at all to approximately 19,000 former customers (or 25% of the total affected customers).[138]

SED also alleged that Comcast had other measures that it could and should have taken to help aggrieved customers, such as issuing a press release or public statement to ensure all affected customers are aware of the Breach and to utilize its *Online Site Removal,* discussed above, to mitigate customers' exposure on the Internet.[139] Comcast does not address or refute these allegations in its Brief.[140] Instead, Comcast contends that it has addressed all of the harm to consumers, on page 44 of its Brief, in arguing against the imposition of penalties.

However, as explained in SED's Brief, Comcast has failed significantly in its remedial efforts because the most significant harm to consumers – the long-term

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[135] Comcast Brief, at 23.

[136] Due to the formatting problem identified above, this section was labeled as section "G" in SED's Opening Brief, although it was "H" in the outline.

[137] *See* Comcast Brief, at 20.

[138] *See generally* Exhibit SED 3, Momoh Rebuttal Testimony; *see also* Exhibit SED 6, Christo Rebuttal Testimony, at 38-42; *see also* SED Brief, at 65-79, 121-123.

[139] *See ibid*.

[140] *Compare* Comcast Brief, at 20-22, *with* SED Brief, at 65-81, 121-123.

consequences of the Internet publications – remains unaddressed today.[141] Moreover, while Comcast insists that its remedial efforts are either comparable or better than Cox's,[142] the evidence shows that Comcast did substantially less even though the scope of its breach was much larger.

1. Comcast's Remedial Efforts Were Not Adequate to the Task at Hand

In arguing against penalties, Comcast makes a disturbing assertion that "there was no unaddressed harm" to customers.[143] "While Comcast does not dispute that the Release caused substantial concern for consumers," it claims that its two redress options addressed all of the harm to customers. The only two "redress options" are: (i) extra service credits or monetary relief that Comcast, in most instances, unjustly conditioned upon execution of a general release[144] and/or (ii) a replacement phone number purportedly at no charge.[145]

However, neither addresses the most blatant harm to customers – having their confidential information published on the Internet, where it continues to reappear on third party websites.[146] Jane Doe 11's testimony, in addition to other customer witnesses' testimony and customer complaints,[147] establishes this real harm:

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[141] *See* SED Brief, at 65-70, 75-79, 121-123; *see also* section III.F, *supra*.

[142] *See* Comcast Brief, at 44-45.

[143] *See id*., at 44.

[144] *See* Exhibit COM 105, Stephens Direct Testimony, at 16; *see also* SED Brief, at 121-123; *see also*, *e.g*., HT (Jane Doe 11), at 152:8-20 ("I don't really think I can talk about this because I was forced to sign a release to have any remedy to what happened to me. And so I feel like I -- I'm on shaky ground here that I can't"); *see also* Exhibit SED 2C, Momoh Opening Testimony, **Attachment Y** (Escalated customers who Comcast required to sign releases but did not do so).

[145] *See* Comcast Opening Brief, at 22. Evidence in the record from John Doe 8 raises doubt as to whether Comcast "offered a replacement phone number at no charge." *See* Exhibit SED 2C, Momoh Opening Testimony, Attachment P.8 (Declaration of John Doe 8 ["I am aware that Comcast has represented that they offered the customers affected by their error a new phone number free of charge. The two letters that I received did not inform me of that option. So I was forced to pay for Comcast's mistake.] and Exh. 4 [phone bill showing $20 charge for "Number change"]).

[146] *See* SED Opening Brief, at 65-71, 75-79, 121-123.

[147] *See*, *e.g*., SED Brief, at 66-70, 77-79.

> Q. And Ms. Stephens argues that "Comcast is not aware of any direct correlation between the inadvertent release and the listings in Attachment V to Mr. Momoh's testimony." And those -- the Attachment V in Mr. Momoh's testimony shows that some of the affected subscribers were still found on some of the people finder directories. And is that your case as well?
>
> A. Absolutely. …[148]
>
> Q. The question is did you experience a similar situation when you found yourself on other online directories?
>
> A. Yes. It's what I tell my young adult and teenage kids. Once you put something on the internet, it is on there forever. The genie is out of the bottle. These data aggregators -- when my information appeared on Ecolisting for God knows how long, that information got gobbled up. And it's out there and it just keeps reappearing. And it's -- my home address and my phone number are forever connected in a public way that can't be undone.
>
> Q. And prior to this did you find your home address on the internet in this manner?
>
> A. Never.[149]

There can be little doubt that all 75,000 customers experienced something similar, as Comcast placed them all in the same predicament by publishing their confidential information on Ecolisting.com.

Indeed, in the notification letter it sent to affected customers, Comcast informed them of this very harm: "your XFINITY Voice telephone number was inadvertently published in our online directory, Ecolisting.com, through which a third party publisher could have obtained your information, even though you previously requested a non-published or non-listed status."[150] In other words, as Comcast states in the fine print of its

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[148] HT (Jane Doe 11), at 160:5-15.

[149] HT (Jane Doe 11), at 161:1-17; *see also* HT (Jane Doe 2), at 329:24–331:8.

[150] *See* Exhibit SED 2, Momoh Opening Testimony, **Attachment P.8** (Declaration of John Doe 8, Exh. 1).

Privacy Notice, "[o]nce our subscribers' names, addresses, and telephone numbers appear in telephone directories or directory assistance, they may be sorted, packaged, repackaged, and made available again in different formats by anyone."[151]

Comcast made no effort to mitigate this harm, even though, as discussed above, it was keenly aware of this reality.[152] The most egregious aspect of Comcast's inaction was that it already had a specific remedial process in place – *Online Site Removal*, which is fully discussed in section III.F, *supra*.[153] Comcast used this process since at least October 2009 to resolve trouble tickets related to a specific problem code related to non-published directory listings.[154] Comcast's witness, Ms. Stephens, testified that resolution of these trouble tickets specifically included, "removing listings from (non-Ecolisting) online directories."[155]

But, in the same testimony, Ms. Stephens then flagrantly denies awareness of any "direct correlation" with customers being published on Ecolisting.com and then appearing in other online directories.[156] When asked during cross-examination why Comcast did not perform *Online Site Removal* for the 75,000 affected customers, Ms. Stephens was no longer denying the correlation. Instead, she was now claiming that Comcast could not perform *Online Site Removal* anymore:

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[151] Exhibit SED 5, Christo Opening Testimony, **Attachment A** (Comcast Customer Privacy Notice, at p. 6 or COMCAST_AG_000672).

[152] *See* Exhibit SED 5, Christo Opening Testimony, **Attachment A** (Comcast Customer Privacy Notice, at p. 6 or COMCAST_AG_000672); s*ee also* Exhibit COM 106C, **Attachment B** (NCAR Methods and Procedures for Directory Listings); *see also* SED Opening Brief, at 65-70, 75-79, 121-123.

[153] *See* Exhibit COM 106, Stephens Rebuttal Testimony, at 8-9 ("The NCAR Method and Procedure also included processes for updating directory assistance and removing listings from (non-Ecolisting) online directories."); *see also*, Exhibit COM 106C, Stephens Rebuttal Testimony, **Attachment B** (NCAR Methods and Procedures for Directory Listings, at COMCASTPOST-OII_016225-016229); *see also* section III.F, *supra*; *see also* SED Brief, at 65-70, 75-79, 121-123. .

[154] *See* Exhibit COM 106C, Stephens Rebuttal Testimony, **Attachment B** (NCAR Methods and Procedures for Directory Listings, at COMCASTPOST-OII_016210).

[155] *See* Exhibit COM 106, Stephens Rebuttal Testimony, at 8-9.

[156] *See* Exhibit COM 106, Stephens Rebuttal Testimony, at 28; *see also* Exhibit SED 2C, Momoh Opening Testimony, **Attachment V**.

> Q Ms. Stevens (sic), do you know why Comcast did not try to remove the directory listings for the 75,000 customers?
>
> A I do. Many of these sites now – well, all of them that we looked at require that you show some type of proof of identity that you're removing your own information, so we were no longer able to do that.[157]

This was not true. This issue casts further doubt on Ms. Stephens' credibility.

Trouble Tickets opened after 2013 for affected customers, which had been specifically escalated to Ms. Stephens' team, showed that Comcast was still removing subscriber listings from non-Ecolisting websites.[158] For instance, an ESL Trouble Ticket from May 2013 stated:

> Once a listing appears on this site [ecolisting.com], other websites such as whitepages.com can collect the data to publish on their own site. I personally removed the white pages listing on 5/23/13 at 6:08pm MST.[159]

Another ESL Trouble Ticket from February 2013 stated:

> I informed him that there was a listing w/his name, address & TN on whitepages.com which I removed today. He appreciated me doing this…[160]

Internal emails from Ms. Stephens also shows that she was more concerned about Comcast's staffing resources than expeditiously resolving customer concerns. For example, Comcast's Brief states that it "established a dedicated toll-free line that any Affected Customers' could call if they had questions or needed further assistance."[161] But, when Ms. Stephens had the opportunity to assist customers by allowing those who

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[157] HT (Stephens), at 534:5-14; *see also* e.g., Exhibit SED 5C, Christo Rebuttal Testimony, at 38-40.

[158] *See* SED Brief, at 68-69.

[159] Exhibit SED 2C, Momoh Opening Testimony, **Attachment I**, at p. 13 (No. 94, Trouble Ticket ESL 928468, Comcast_AG_003338-3346).

[160] Exhibit SED 2C, Momoh Opening Testimony, **Attachment I**, at p.3 (No. 21, Trouble Ticket ESL 00833720, Comcast AG_001405-1408).

[161] Comcast Brief, at 21.

received the automated calls to be directly connected to the "specialized team of care agents"[162] staffing the toll-free line, she decided against it.[163] Ms. Stephens ultimately abandoned this option because Comcast apparently did not have enough agents to handle their current call volume.[164] However, even when Ms. Stephens originally considered this option, she was not concerned about customers. Indeed, she was hoping that few customers would be home so that they would not attempt to directly connect to a Comcast agent.[165] Ms. Stephens' conduct belies Comcast's contention that "Comcast personnel acted reasonably and expeditiously" in carrying out Comcast's remedial efforts.[166]

Further, Comcast's description of its "redress options" as "offers" is misleading.[167] It implies that Comcast voluntarily proposed these options *sua sponte* when customers called the toll-free number. It did not. Customers had to demand further relief; otherwise, their only option was a refund/credit for the non-published fees. For instance, Jane Doe 11 testified that Comcast never offered her anything when she contacted the company.[168] Similarly, Jane Doe 2 did not receive any "offers" from Comcast when both she and her husband called Comcast numerous times.[169] These customer experiences

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[162] *See id*., at 21-22.

[163] *See* Exhibit SED 3C, Momoh Rebuttal Testimony, at 9-10.

[164] *See ibid*.

[165] *See ibid*.

[166] Comcast Brief, at 20.

[167] *See* Comcast Brief, at 22.

[168] HT (Jane Doe 11), at 159:20-25 ("So Comcast never offered me anything. It's [internet scrubbing] something I basically had to demand from them at threat of legal action. It is a service that I paid for and is – as it appears is woefully inadequate to undo what they did to me.").

[169] HT (Jane Doe 2), at 327:8-17, 329:24-330:3:

> A. …So that was over a year ago that we didn't get a resolution. As far as we are aware, we had not gotten any phone calls from Comcast. Because I kept on bugging my husband why, what happened? He says they just kind of gave me the runaround. They didn't explain what was going on. My husband is very assertive, much more than I am. And he didn't get very far, which is concerning to me. …
>
> Q. I'm just focused on the experience that -- the steps that you took to

(Footnote continued on next page)

underscore Comcast's failure to redress the lost productivity and monetary value of the thousands of hours that consumers spent on the phone trying to get adequate relief from Comcast[170] or to simply get Comcast to get their non-published status correct.[171]

Finally, Comcast's claim that it acted expeditiously to provide redress[172] is contradicted by the evidence. Currently, over two years after its purported discovery of the Breach, 25% of the affected customers have still not received *any* redress from Comcast. Moreover, there is no indication in Comcast's Brief that these customers will ever receive relief from Comcast. Accordingly, the evidence establishes that Comcast's remedial efforts were neither reasonable, nor expeditious.

2. Comcast Committed a Bigger Breach and Caused More Harm than Cox Did, but Comcast Did Substantially Less than Cox to Remedy Its Breach.

Comcast compares its remedial efforts with those taken by Cox fourteen years ago, and contends that Comcast's remedies were "comparable" and in some cases "above the amounts" provided by Cox.[173] Comcast's Brief again leaves out salient facts in this comparison, facts that demonstrate just how unreasonable Comcast's remedies were. Comcast actually did substantially less than Cox to remedy a problem that was substantially larger.[174]

First, Comcast's apparent assumption that it only needed to provide remedies "comparable" to what Cox did is incorrect. The breaches and attendant harm were not

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> try to reach a resolution with them. And at any point in time did Comcast ever offer you, you know, we will go online and try to remove all of your information off of the Internet?
>
> A. That is another thing, no.

[170] *See e.g.*, HT (Jane Doe 2), at 325:14-330:20; *see also* SED Brief, at 108.

[171] *See e.g.*, Exhibit SED 2C, Momoh Opening Testimony, **Attachments P.1** (Declaration of John Doe 1) and **Attachment J** (Spreadsheet of escalated hotline customers who contacted Comcast before October 2012); *see also e.g.*, Exhibit SED 3, Momoh Rebuttal Testimony, **Attachment B** (Jane Doe 10).

[172] See Comcast Opening Brief at 20.

[173] Comcast Opening Brief, at 43.

[174] *See* SED Opening Brief, at 79-81, 112-113.

comparable. Most notably, Comcast's Breach was on the Internet. The speed of transmission, search functions, and digital storage capability, all of which have grown concomitantly with the Internet, change everything.

SED set out in its Opening Brief the lack of comparability between the two cases in every other aspect as well:

- Comcast's breach affected approximately fifteen times more non-published customers (75,000 Californians versus 11,455 for Cox);
- Comcast's breach lasted considerably longer (28 months versus 9 months for Cox);
- Comcast's non-published numbers were much more widely distributed (Internet, print directories, directory assistance, third party publishers, a telemarketer, and other non-publisher third parties versus the discrete number of paper directories for Cox);[175]
- Comcast waited two months after discovery to tell the Commission, while Cox came to the Commission within a month;
- Cox took robust steps to challenge non-cooperative parties (Pacific Bell), filing a motion for temporary restraining order within a month of discovery, while Comcast appears to have taken a more *laissez-faire* attitude with the online sites where it knows that its listings are likely to land (see discussion of *Online Site Removal* process above);
- Cox offered a comprehensive package of remedies (its privacy package) while Comcast offered nothing except a refund (without interest) of monies paid, unless the customer protested; and
- Cox engaged outside experts to study the breach and how to remedy it, whereas Comcast has failed to have any outside investigation of its breach, and still has not delivered its internal "audit".[176]

[175] *See* SED Opening Brief, at 79-81, 112-113.

[176] *See generally* SED Brief, at 79-81.

I. Comcast Non Published Policies and Procedures Before and After Discovery of Release (Comcast Section G).

Even in the face of this massive privacy Breach involving a multi-state release of approximately 83,000[177] non-published listings (approximately 75,000 in California), that went undetected for 27 months, Comcast apparently sees no fault in its pre-Breach processes for handling non-published listings.[178] Instead, it boasts that "[p]rior to the Release, Comcast had reasonable processes to prevent the disclosure of non-published listings."[179] If that were the case, then why would Comcast have needed, as it claims, to have "dedicated considerable amount of time and expense to improving its processes and policies – all with the goal of preventing the type of error that resulted in the Release from ever happening again"?[180] Had Comcast's processes been reasonable – had Comcast not sent the non-published subscriber listings to any third party (even its agent) in the first place – we likely would not be here today.[181]

Comcast's Brief points to three pre-Breach processes: (i) "its process for identifying non-published listings" (i.e., the use of a privacy flag), (ii) "its contractual requirement that Neustar ensure that non-published data is not provided to licensees" (i.e., section 2.3 of the 2011 DLLDA contract), and (iii) "procedures for addressing customer concerns regarding directory listings"[182] (i.e., the escalation process for issues involving directory listings on Ecolisting).[183] While Comcast's Brief provides little detail beyond

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[177] *See* Exhibit SED 6, Christo Rebuttal Testimony, at 4-5.

[178] Comcast Brief, at 23.

[179] *Ibid*.

[180] *Id*., at 25.

[181] *See* SED Brief, at 31-42, 58-64, 109-111.

[182] Comcast cites to the NSAR Procedures contained in Exhibit COM 104C, Donato Rebuttal Testimony, **Attachment M**. These procedures are specific to Ecolisting complaints, and implemented in August 2012. Whereas, the pre-Breach complaint resolution process that included *Online Site Removal* is found in *NCAR Methods and Procedures for Directory Listing* contained in Exhibit COM 106C, Stephens Rebuttal Testimony, **Attachment B**. *See* SED Brief, at 78.

[183] *See* Comcast Brief, at 23.

this short list,[184] SED's Brief demonstrated how each one these "processes" was seriously flawed.[185]

The first two processes are the most troubling. The flawed data query used to identify non-published listings is described above, as is Comcast's decisions to send directory listings to Targus/Neustar, LSSi, other carriers, at least one directory assistance provider, and other third parties, *regardless of whether they had non-published or published status*.

As to the third process – the *NSAR Method & Procedure*, a process for "investigating and addressing non-published directory listings issues" – Comcast did not have this process in place prior to the Breach.[186] To the contrary, this process was not implemented until at least the end of August 2012,[187] two years after Comcast states the Breach started. Had Comcast acted reasonably in instituting this type of process when it decided to launch Ecolisting.com in July 2010 because it was already aware that errors did occur with non-published listings,[188] it would not have taken Comcast 27 months to discover the Breach.

There are also several issues with the eleven "new safeguards" enumerated in Comcast's Brief: one is not new (Conducting Full Data Refreshes); three could and should have been naturally implemented with the launch of Ecolisting (Conducting Ecolisting Spot Checks, Validating Billing System Data, Root Cause Analyses); two are expected business activities (Improving Internal Communication and Implementing Training); and two appear to be incomplete (Developing an Almost Instantaneous

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[184] *Ibid*.

[185] *See* SED Brief, at 31-42, 58-64, 109-111.

[186] *See* Exhibit COM 104, Donato Rebuttal Testimony, at 19.

[187] *See* Exhibit COM 104C, Donato Rebuttal Testimony, **Attachment M**., at p. 7 or COMCASTPOST-OII_16552.

[188] *See* Exhibit COM 106C, Stephens Rebuttal Testimony, **Attachment B** (NCAR Methods and Procedures for Directory Listings); see also Exhibit SED 4, Christo Opening Testimony, **Attachment A** (Comcast Privacy Policy Notice).

Delivery Process and Commissioning Internal Audits).[189] Moreover, Comcast has provided no objective evidence of the time and cost it has dedicated to implement these "safeguards."

J. The Factual Record Supports Substantial Penalties Against Comcast (Comcast Section IVD (Legal))

In its Opening Brief, SED set forth the factual record justifying the imposition of penalties in this case, per the Briefing Outline. Comcast's Opening Brief mentions them only in passing as part of its legal argument, and in this Reply Brief, SED will likewise address Comcast's factual contentions in the legal discussion below.

IV. LEGAL ISSUES

This is a privacy case. Privacy has many sources in the law: state and federal constitutions; state and federal statutory law; common law and its reflection of the evolving social understanding of privacy. And privacy has many facets - safety and security, disclosure, and contractual obligations, to name a few. Comcast's Brief considers several of the legal sources cited in the OII, but does so in isolation; it ignores other facets of the Investigation highlighted by SED throughout. SED maintains that these legal sources must be considered together, and urges the Commission to consider all sides of the privacy problematic uncovered by this Investigation.

The FCC's recent Notice of Apparent Liability (NAL) in the *Terracom* case, cited in SED's Opening Brief, demonstrates that a large-scale disclosure of consumer information can trigger a number of different legal concerns. Like Comcast, Terracom and business partners stored sensitive consumer information, and inadvertently disclosed it on the Internet.[190] The FCC tentatively concluded that Terracom violated 47 U.S.C.

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[189] *See* Comcast Brief, at 23-25.

[190] SED Brief at 112-113, and fn 369, *citing In re TerraCom Inc and YourTel America Inc.,* FCC 14-173, Notice of Apparent Liability, 2014 FCC LEXIS 3999 (October 24, 2014), also available at http://www.fcc.gov/document/10m-fine-proposed-against-terracom-and-yourtel-privacy-breaches. Comcast may object that the *Terracom* breach involved social security numbers, as well as name, address, and telephone number. It is true that the *Terracom* and the instant case are not on all fours with

(Footnote continued on next page)

§ 222(a), which protects the privacy of telephone consumers' personal information, in several different ways: (1) the Breach itself;[191] (2) the lack of "just or reasonable data security practices";[192] (3) the failure to adequately disclose the company's data security practices;[193] and (4) and the failure to properly notify consumers after the Breach.[194] In this way, *Terracom* mirrors SED's concerns in the instant Investigation, and provides a framework to consider the issues raised by Comcast's Brief.

A. The Commission Has Jurisdiction Over this Matter

Comcast's opening gambit, and the main thrust of its Brief, is a double-barrel attack at the Commission's jurisdiction to investigate and address the release of 75,000 non-published subscribers' personal information onto the Internet. Comcast claims this Investigation is barred by SB 1161 (section 710) and that the Commission cannot enforce the privacy provisions of the California Constitution.

1. Section 710 (SB 1161) Does Not Bar This Investigation

Comcast's argument that section 710 precludes this action rests on its contention that this Investigation amounts to an "exercise [of] regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services."[195] Comcast's Brief tacitly admits that it is a collateral attack on the Administrative Law Judge's March 11, 2014 *Ruling Denying Comcast's Motion to Dismiss* (the "Ruling").[196] Comcast's argument fails for a number of reasons.

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each other, in that the facts of each case are unique. In the instant case, for instance, customers were *paying* for a privacy protection which was not delivered, and in *Terracom* they were not. SED.

[191] *See id.*, at ¶¶ 29-30.

[192] *Id.*, at ¶¶ 31-35.("the Companies failed to employ even the most basic and readily available technologies and security features for protecting consumers' PI").

[193] *Id.*, at ¶¶ 36-38.

[194] *Id.*, at ¶¶ 39-44.

[195] Comcast Brief, at 25, *citing* P.U. Code § 710.

[196] Comcast Brief, at 25 ("arguments set forth in Comcast's motion to dismiss … were rejected by the

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a. The ALJ's Ruling Was Correct

Comcast purports to locate the Ruling's errors in its focus on "local interconnection service." Thus: "[t]he unremarkable fact that Comcast Phone provides 'interconnection service' to Comcast IP for VoIP service is not, however, a basis for the Commission's jurisdiction over this matter."[197] According to Comcast, "allowing the Commission to exercise 'regulatory jurisdiction or control' over VoIP service whenever a regulated entity provides 'interconnection' [to the VoIP entity] would nullify Section 710."[198]

In so arguing, Comcast misconstrues the Ruling. It approved Commission jurisdiction over this case not just because there was utility interconnection somewhere in the mix, but because the provision of directory listings is itself a fundamental utility function. The Ruling correctly overruled Comcast's objections to jurisdiction based on SB 1161 because the business practices at issue have little "to do with the provision of VoIP services for the making and receiving of phone calls by Comcast's customers as defined by law."[199]

Rather, the focus of the OII is on "the conduct of the CPUC licensee Comcast Phone in the release of confidential customer information associated with phone numbers issued to Comcast Phone and the resulting loss of customers' privacy."[200] Still, Comcast persists with its own version of what this Investigation is "about," in an attempt to shift the focus from its regulated utility to its IP-enabled voice services:

> This investigation is about the inadvertent Release of customers' nonpublished listings and the impact of that Release on *end-user VoIP* customers; it is *not* about the

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Motion to Dismiss Ruling"). Comcast then refers to "certain errors in the Motion to Dismiss Ruling," presumably referring to the Ruling and not the Motion. *Ibid.*

[197] *Id*., at 26.

[198] *Ibid*.

[199] Ruling, at 2.

[200] Ruling, at 20.

> interconnection services that Comcast Phone provides to customer Comcast IP and the impact of those wholesale services on Comcast IP.[201]

Here, Comcast has a considerable lift to accomplish, as the Ruling sets out its logic in detail:

> Comcast Phone provided those phone numbers through a contract to its affiliate for local service. Comcast Phone entered into the contract with the publisher that led to the publication and release in online and print phone directories and through directory assistance of more than 74,000 names, addresses, and phone numbers of Californians who paid Comcast to keep that information private.[202]

Although the Ruling does not discuss it in detail, the "contract with the publisher," known as the Directory Listing License and Distribution Agreement (DLLDA) between Comcast and Targus, is significant in that it clearly identifies Comcast the CLEC as the entity that generates, distributes, and licenses the directory listings (and nowhere does it mention Comcast IP).[203] This is the same contract that appoints Phil Miller as Comcast's

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[201] Comcast Brief, at 27.

[202] Ruling, at 20-21.

[203] See OII at 6, fn. 25 *citing* the recitals in the DLLDA:

> *WHEREAS, Comcast, in its capacity as a LEC, generates DL [directory listing] Information as a result of providing wholesale and retail telecommunications services; and*
>
> *WHEREAS, Comcast's DL Information is used and useful in creating paper and electronic telephone directories, for providing directory assistance ("DA") services (i.e., 411), and for other purposes; and*
>
> *WHEREAS, as a LEC, Comcast is obligated under Sections 251(b)(3) and 222(e) of the Act to provide DL information to eligible requesting LECs and directory publishers; and*
>
> *WHEREAS, Targus is a distributer of DL information to LECs, directory publishers, and other users of DL information.*

The *Directory Listing License and Distribution Agreement* further states that Targus is Comcast's agent for purposes of fulfilling Sections 222(e) and 251(b)(3) of the Communications Act, sections that apply to telephone corporations and not IP providers. DLLDA at 2, ¶ 2.1. The DLLDA is found in what staff understands to be its entirety at confidential **Attachment 11** to the Staff Report (Exhibit SED 1C), and as confidential **Attachment T** to the Christo Direct Testimony (Exhibit SED 5C).

"point of contact" for technical issues, including the privacy flag, and general data security concerns.[204]

Thus, while the privacy Breach affected the customers of an entity nominally referred to as "Comcast IP," the failures that caused the privacy Breach were squarely those of the certificated utility, pursuing its utility business, as explained further below.

The Ruling similarly rejects Comcast's retroactivity argument, which it finds is "negated by the stat[ute]'s forward-looking effective date of January 1, 2013, more than three months after the bill that implemented section 710 was signed."[205] Comcast's Brief does not challenge that conclusion. And, while Comcast's Brief similarly does not challenge the Ruling's conclusion that the California Constitution's privacy provisions are laws of general applicability, it does contest the Commission's authority to *enforce* that law of general applicability. This issue is discussed below.

Comcast closes out its attack on the ALJ's Ruling with the common resort of telephone utility Respondents – that some communication from lower-level Commission staff absolves them of their duties as telephone corporations. Here, Comcast finds this in two letters from the Commission's Consumer Affairs Branch (CAB) to consumers who complained about Comcast XFINITY Voice, where staff responded that "our ability to assist you is limited," due in part to the passage of SB 1161. As the Commission has pointed out on numerous occasions, it speaks only through its decisions and is not bound by the expressions of its line staff.[206]

b. Additional Reasons Why Comcast's Attack on the Commission's Jurisdiction Must Fail

There are several additional reasons why Comcast's jurisdictional argument fails.

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[204] SED Exhibit 1C, Staff Report, **Attachment 11** at ¶ 3.4 (Miller to be Comcast's ***"[redacted]"***).

[205] Ruling, at 15.

[206] *See, e.g.,* D.00-09-042 (Cal Water) ("it is well settled that the Commission speaks only through its written decisions"); D14-01-037 (TracFone), Slip Op., at 21 ("More importantly, staff advice is not

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First, what is at stake is the basic telephone service of non-published directory listings. Directory assistance and directory listings have been among the essential "service elements" of telephone Basic Service since at least 1996.[207] They continue to be a core value, and core issue, around telephone basic service down to the present day. Verizon, for instance, cited the high number of non-published customers in seeking permission to stop publishing hard-copy white page directories (over the objections of consumer groups like TURN), and move all its directory listings online:

> Verizon reports that, due to privacy concerns, particularly in California, approximately 40% of residential telephone numbers are unpublished or unlisted, thus reducing the scope and usefulness of residential white page listings.[208]

As recently as the Commission's 2012 updating of the Basic Service elements, the Commission reiterated that directory listings, and the ability of customers to opt out of those, were essential basic telephone service elements:

> Directory services: access to directory assistance within the customer's local community; options for listed or unlisted directory listings; and options for free white pages telephone directory.[209]

This is the world of Basic Service elements that Comcast Phone elected to provide when it became a CLEC, and which Comcast Phone fought to maintain even after it

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binding on the Commission").

[207] D.96-10-066, at Appendix B, Rule 4(B)(7), (10), and (11), defining "service elements" of "Basic Service" to include "access to local directory assistance," "directory listing" and a "white pages telephone directory."

[208] Resolution T-17302, Approving Verizon Advice Letter requesting permission to cease white page publishing, at page 10 (2011), available at http://docs.cpuc.ca.gov/PublishedDocs/PUBLISHED/FINAL_RESOLUTION/137222.htm. Interestingly, Verizon used Supermedia to publish its directory information, presumably the same "Supermedia" to which Comcast sent non-published listings in this case. *Id.*, at 2; *compare* Exhibit COM 103, Donato Direct Testimony, at 21:13-22. In a further indication of how interrelated the telephone and data aggregation industries are, Communications Division Staff describe SuperMedia in T-17302 as "an online advertising, direct mail, and yellow pages publishing company spun off from Verizon in 2006, the successor to Idearc Media LLC, formerly known as Verizon New Media Services Inc." *Id.*, at 2, fn. 2.

divested itself of retail customers. In the Application proceeding about its planned divestment of its regulated residential telephone business, Comcast Phone argued that it was going to continue as a telecommunications carrier, even as it sought to transfer [at least some of] its residential customers to Comcast Digital Phone and other carriers. As stated in D.08-04-042, "Applicant contends that it will 'continue to provide regulated access service.'"[210] Indeed, Comcast strenuously argued that it would not only continue to offer "exchange access service," but that it would:

> continue to provide wholesale telecommunications service inputs in support of its retail interconnected VoIP service offerings, including telephone exchange services, exchange access, *numbering resources*, E911 connectivity, [and] CALEA compliance.[211]

Secondly, as provided in both the Comcast-Targus DLLDA contract (described above), and in the Local Interconnection Service ("LIS") agreement between Comcast Phone and Comcast IP ("Interconnection Agreement") described below[212], it was Comcast Phone – not Comcast IP – that controlled the action when it came to those numbering resources, directory lists, telephone numbers and related subscriber information.

Third, Comcast's jurisdiction and jurisdiction-related arguments (pages 25-31) fail to address SED's point – raised first in the October 2013 Staff Report, and in subsequent staff testimony – that Comcast is a fully integrated company, and that the distinctions between Comcast Phone and Comcast IP are largely fictitious. Thus, staff is once again put in the position of having to guess how, if at all, Comcast will address this.

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[209] D.12-12-038, Slip Op., at 17-18.

[210] D.08-04-042, Slip Op., at 12.

[211] Comcast's January 28, 2008 Reply to Surewest Protest of Comcast's Application to Discontinue Service, at 7, available in the Commission online docket for A. 07-11-014, Comcast's Application for Authority to Discontinue [Residential Retail] Telecommunications Services in California.

[212] *See* discussion of the TDM-IP split in the LIS Agreement, addressed in the section IV.C.2.a (2891.1), *infra*.

While it is true that Comcast Phone, not Comcast IP, is the entity licensing directory listings to Targus and others, the more fundamental point is that there is little distinction between them. As the Staff Report recites, neither Comcast Phone nor Comcast IP has employees or leases in its own name.[213] This reality was patently obvious as Comcast employees struggled to explain the activities of the Comcast entity for which they work, or from which entity they received a paycheck.[214]

For all the confusion and blurring of corporate lines within Comcast, Comcast Phone remains an essential cog in the Comcast engine. Without a certificated telecommunications carrier, Comcast would have had no access to telephone numbers,[215] pole attachments,[216] and mandated interconnection with other regulated carriers.[217]

2. The Commission Has Jurisdiction to Enforce Laws of General Applicability, including the State Constitution when Applied to Public Utilities.

Comcast first argues that section 2101 is the "sole basis" on which staff seeks to apply the Constitution (and other non-Public Utilities Code law) to Comcast, and then posits that 2101's reach is limited to "constitutional and statutory provisions '*affecting public utilities.*"'[218]

As an initial matter, if Comcast Phone is the admitted utility affiliate that controls the telephone numbers and related customer information, it is difficult to see how the

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[213] *See* Exhibit SED 1C, Staff Report, at 6 (** [redacted] "***).

[214] *See, e.g.,* HT (Munoz) at 383:18-385:2.

[215] *See* 47 USC §251(e) ("telecommunications numbering"); 47 CFR § 52.9(a)(1) (FCC shall make "telecommunications numbering resources … available to telecommunications carriers"); *see also* Ruling at footnotes 12 and 13.

[216] *See* 47 USC 251(b)(4) (incumbents required to grant access to "poles, ducts, conduits and rights-of-way" to other "providers of telecommunications services").

[217] *See* 47 USC §§ 251-252; *see* in particular § 251(a) (only "telecommunications carriers" entitled to interconnect); § 251(c)(1) (only "telecommunications carriers" can request interconnection), *etc.*

[218] Comcast Brief, at 29.

application of the Constitution's privacy provisions to Comcast would somehow *not* "affect [a] public utility."

Secondly, SED contests that section 2101 is the "sole basis" on which the Constitution can be applied in this case. If Comcast's conduct violates the California Constitution, it is difficult to see how that conduct can be "just and reasonable" under section 451, or why it would be outside the authorization of the Commission to "do all things … necessary and convenient" in the regulation of public utilities, as stated in section 701 of the Public Utilities Code. Thus the Code and Constitutional sections cited by SED work together – the main privacy Breach violated multiple sections of the Constitution, as well as California Public Utilities Code sections 451 and 2891.1. This is reflected in the chart of Comcast's violations at page 117 of SED's Opening Brief, where the violations are not separated by specific legal authorities, but by the gravamen of the wrong. Thus, Comcast's conduct includes the release itself, Comcast's baseline practice of sending non-published subscriber information to third parties, its disclosure practices, and its charges for services that were not provided. These are all distinct wrongs, and each in itself violated multiple provisions of the law.

Even assuming that section 2101 was the "sole basis" for application of the Constitution here, the statute itself is clear: "The Commission shall see that the provision of the Constitution and statutes of this State affecting public utilities … are enforced and obeyed." Comcast essentially argues that the reference to the Constitution is only to the section of the Constitution that "specifically" mentions "Public Utilities" – Article XII.[219] If that were true, one might ask why the Legislature did not say that, or why the reference to statutes was not limited to the Public Utilities Code or statutes that specifically reference public utilities and the Commission .

The only authority Comcast cites is dicta from a section of D.06-03-013 (the Commission's second consumer Bill of Rights decision) addressing "Increased

[219] Comcast Brief, at 27.

Cooperation With Local Law Enforcement Personnel." The Commissioners remarked that "[t]he Commission is limited in pursuing enforcement actions under the P.U. Code and our rules," while the "AGs and DAs … may bring actions not only under the PU Code but also under general anti-fraud laws and the criminal code."[220] The Commission failed to note in that section, however, the contrary decision of the California Supreme Court three years earlier, holding that the Commission and the Attorney General have largely "overlapping" jurisdiction:

> [A] number of statutory provisions expressly authorize public law enforcement officials (in addition to the PUC) to initiate civil enforcement actions against public utilities in instances of alleged misconduct by such utilities. In expressly establishing overlapping enforcement authority against public utilities by both the PUC and public prosecutors, the Legislature has demonstrated that it contemplates that public prosecutors and the PUC will coordinate their enforcement efforts--and that the superior court in such a civil action can tailor its proceedings and rulings--to avoid any actual conflict.[221]

That overlapping jurisdiction has been evident throughout this case, where the AG's office and Commission staff have cooperated from the outset, and where representatives of the AG's office sat through almost the entire three days of evidentiary hearings.

In any event, as demonstrated by the penalty/violation chart in SED's Opening Brief, SED is not attempting to "enforce[] the Constitution right to privacy as a stand-alone claim," as Respondents suggest.[222]

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[220] *Id.*, at 30, *quoting* from D.06-03-013 (Slip Op., at 106).

[221] *People ex. Re. Orloff v. Pacific Bell*, 31 Cal.4th 1132, 1138 (2003) (emphasis added). In that case, the CPUC filed an *amicus* brief, noting that "the Attorney General and the district attorneys expressly are authorized to bring UCL claims in *court*, but that the PUC is not." *Id.*, at 1153. D.06-03-013 cites *Orloff* only in the context of its discussion of a private right of action. See D.06-03-013, Slip Op., at 60-62.

[222] *Compare* SED Brief at 117; Comcast Brief at 30, fn. 148.

B. Burden of Proof and Evidentiary Standards.

Comcast and SED agree the evidentiary standard here is the preponderance of evidence.[223] Comcast does not cite, however, the standards by which that evidence is weighed, except to suggest "personal knowledge [is] admissible."[224] Again, SED agrees. The problem, however, is that Comcast does not present any witnesses who were at Comcast national headquarters or otherwise had such "personal knowledge" of what was happening at Comcast from October 2009 through July 2010, when – according to Comcast – the "Process Error" occurred. The one possible exception to this is Mr. Miller, but his involvement was more transactional than operational, and whose testimony is compromised by the misrepresentations that it contains.[225] The Commission may be guided here by California Evidence Code section 412: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence should be viewed with distrust."

C. Violations of Law

1. Comcast's Privacy Breach Was Egregious, and Violated the State Constitution, in that Consumers Specifically Requested, Paid for, and Expected the Privacy Protections of a Non-Published Number

After its jurisdictional attack on the Commission's authority to enforce California constitutional norms (or any non-PU Code law – see above), Comcast turns to the substance of the constitutional protection, arguing that the Breach here at issue was not "egregious" enough to be a violation of the Constitution.[226]

Comcast does not argue that there is no privacy interest that attaches to non-published subscriber information, or deny that it violated consumers' rights to privacy.

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[223] *See* Comcast Brief, at 31; SED Brief, at 89.

[224] Comcast Brief, at 31 and fn. 151.

[225] SED Brief, at 13-19.

[226] Comcast Brief, at 31-32.

Rather, Comcast's argument is about the *degree* of violation. None of Comcast's "not egregious" violation cases involved the two factors that are material here:

(1) a statute squarely on point, that has to be understood as a specific application of the Constitutional privacy implication; and

(2) a contractual relationship between subscribers and carrier, whereby each subscriber specifically requested and paid Comcast $1.50/month for a privacy service that was not delivered.

Section 2101 mandates that the Commission "shall" see that the sections of the California Constitution affecting public utilities are enforced. This is particularly appropriate here. The California Constitution combines protections for personal safety and privacy, the two subscriber interests that are primarily at issue in this case.

> SECTION 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining *safety*, happiness, and *privacy*.[227]

To establish a claim under the California Constitution, an injured party must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.[228] Comcast appears to concede that SED has satisfied the first two elements of this test by focusing solely on the third element. Accordingly, SED will also focus primarily (but not exclusively) on this third element.

Comcast cites a quartet of cases that it claims stand for the proposition that a privacy breach must be "egregious" before it can be cognizable, and that circumstances of

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[227] The history of this Privacy Initiative and Amendment is discussed, *inter alia,* in *Hill v. NCAA,* 7 Cal.4th 1, 15-19 (1994). Further protection of privacy is found in Article I, § 13 of the California Constitution, which states that the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated... Cal. Const., Art. I, § 13.

[228] *Hill v. NCAA*, 7 Cal.4th 1, (39-40.)

the privacy breach(es) here at issue do not meet the "egregiousness" standard.[229] *None* of these cases involve the two factors cited above: a contractual relationship intended to provide privacy protection, with a specific statute protecting the privacy protection sought through that contractual relationship. None of the cases involve a public utility service. And, none discuss *safety* in conjunction with the constitutional claim.

Comcast nevertheless claims that the third element of the test imposes a "high bar" to establishing an invasion of privacy claim, but provides little guidance as to where that bar actually lies with respect to the facts of this case. [230] Comcast's cases are distinguishable from the instant Investigation. In *Ruiz v. Gap,* plaintiff was a job applicant whose social security number ended up on a Gap laptop computer that was stolen. Gap had notified plaintiff of the loss, and offered to provide twelve months of credit monitoring and fraud assistance without charge, and up to $50,000 in theft insurance.[231] The only injury that plaintiff alleged was that he was now "at an increased risk of identity theft."[232] His constitutional claim failed because the Court did not find this "sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right."[233]

The 75,000 California non-published subscribers who lost the privacy of their name, address, and telephone number – privacy that they had paid for – present a clearly distinguishable situation. Their damages are not potential, but real, "the genie is out of

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[229] *See* Comcast Brief, at 32-33, *citing Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986 (2011); *Ruiz v. Gap, Inc.*, 540 F.Supp. 2d 1121, 1124-1125 (N.D. Cal. 2008); *In re iPhone Application Litig*., 844 F.Supp.2d 1040, 1063 (N.D. Cal. 2012); and *In re Yahoo Mail Litig*., 2014 WL 3962824, *15 (N.D. Cal. Aug. 12, 2014).

[230] Comcast Brief, at 31-32, *citing In re Yahoo Mail Litig.*, 2014 WL 3962824, *15 (N.D. Cal. Aug. 12, 2014.)

[231] *Ruiz v. Gap, Inc.*, Supra 540 F.Supp. 2d 1121, 1125.

[232] *Ibid.*

[233] *Id.,* at 1128, *citing Hill v. NCAA,* 7 Cal.4th 1, 37.

the bottle," their names, addresses, and phone numbers were on the Internet, along with maps and directions to their houses.[234]

Moreover, in *Ruiz* as in the other Comcast cases, there is not the "social norm" that is codified in section 2891.1. As the Court in *Chapman* noted, the telephone is a "virtual necessity of modern life" – and one must in almost all cases provide billing information in order to receive service.[235] The *Chapman* Court described the framework of consumer choice which is created within this quasi-fiduciary relationship:

> [A]n unlisted telephone number is usually requested in order that a person's name and address *will not be revealed to anyone other than the telephone company*. The fact that a significant percentage of customers take affirmative steps to keep their names, addresses and telephone numbers confidential demonstrates the importance of this privacy interest to a large portion of the population.[236]

A further aspect of the egregious violation of the social norm(s) here at issue is that Comcast violated the core expectation of the consumer paying for an unlisted or non-published service, that the number would "not be revealed to anyone other than the telephone company." Undisclosed and presumably unbeknownst to non-published customers, Comcast *was* providing their numbers to a third party, indeed to a company that was in the data aggregation business.

Comcast's other cases are of no more avail. The only California State case in the mix is *Folgelstrom,* and there the alleged violation is that the defendant Lamps Plus stores asked consumers for their zip codes at checkout. There is no allegation that the zip code

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[234] *See* Exhibit SED 2C, Momoh Opening Testimony, **Attachment V** (maps to Declarants' homes); *see also* HT (Jane Doe 11), at 159:14-16 ("As of yesterday when I reverse looked up one of my phone numbers, there was an arrow pointing to my house again").

[235] *People v. Chapman, Supra,* 36 Cal.3d 98,108 (1984).

[236] *Id.*, at 109 (emphasis added).

was a mandatory condition of doing business with Lamps Plus (nor was Lamps Plus offering an essential service like telephony).[237]

Finally, we have the two "apps" cases – *In re iPhone Application Litigation* and *In re Yahoo Mail Litigation.* Those cases also do not involve the provision of an essential service, or the breach of *contracted for* privacy. They involve non-essential applications that in many cases are "free," and where there is widespread understanding that the service provider gains access to the customer's data in exchange for the free service.[238] Here, not only was the underlying phone service not free, but consumers were paying extra for privacy protection.

The evolving social norms at issue here are reflected by the FCC's move, in 2007, to tighten the privacy protections available to telephone customers. Even though the Commission was addressing CPNI, its rationale applies to other personal customer information, particularly the personal information of non-published subscribers:

> Concerned that inadequate privacy protections contributed to the data broker problem, the Commission initiated a new rulemaking proceeding, received comments, and issued the Order at issue in this case. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 22 F.C.C.R. 6927 (2007) ("2007 Order").
>
> Two months before the Commission adopted the 2007 Order, Congress passed the Telephone Records and Privacy

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[237] *Folgelstrom v. Lamps Plus, Inc.*, *supra*, 195 Cal.App.4th 986, 989. Interestingly, the case does describe the *quid pro quo* between retail vendors and data marketers:

> Lamps Plus then provides the customer's name, credit card number and ZIP code to Experian Marketing Services, a third party credit reporting agency. Experian matches the information provided by Lamps Plus with the customer's address stored in its own records to produce a mailing list, which it licenses Lamps Plus to use.

[238] *Yahoo Mail, supra,* 7 F.Supp.3d at 1021 ("Yahoo operates Yahoo Mail as a free web-based email service"); *iPhone Application Litigation*, *supra*, 844 F. Supp. 2d 1040, 1070 ("Plaintiffs' claim is based on the downloading of free apps").

> Protection Act of 2006, Pub. L. No. 109-476, 120 Stat. 3568 (codified at 18 U.S.C. § 1039). The statute imposed criminal penalties for … selling or transferring customer information, presumably by either data brokers or dishonest company insiders, *id.* § 1039(b)[,] and knowing purchase or receipt of fraudulently obtained customer information, *id.* § 1039(c).[239]

In upholding the FCC's rule in this case, the D.C. Circuit focused its attention on the tension between downstream data brokers, data security, and telephone subscribers' privacy. The Court articulated the "norms," which Comcast has violated here:

> [The FCC]determined that information shared with third party marketers is subject to a greater risk of loss once out of the carrier's actual control; and second, it determined that those third parties would not likely be subject to the confidentiality requirements of § 222 because they are not themselves carriers…
>
> [T]he carrier's sharing of customer information with a joint venturer or an independent contractor without the customer's consent is itself an invasion of the customer's privacy -- the very harm the regulation targets. In addition, common sense supports the Commission's determination that the risk of unauthorized disclosure of customer information increases with the number of entities possessing it. The Commission therefore reasonably concluded that an opt-in consent requirement directly and materially advanced the interests in protecting customer privacy and in ensuring customer control over the information.[240]

This Commission has upheld consumers' privacy rights under both Article I, section 1 and section 13, and should do so here.[241]

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[239] *National Cable & Telecommunications Association v. FCC,* 555 F.3d 996, 999 (DC Cir. 2009).

[240] *Id*., at 999, 1001-02.

[241] *See, e.g.,* D.01-07-032, at 14-15:

> While the utility customers on whom the Narcotic Officers want information do not have privilege claims like those in Gordon, *they do enjoy privacy rights based on Article I, § 13 of the California Constitution*. The California Supreme Court has held, for example, that telephone customers reasonably expect that the numbers they call from

(Footnote continued on next page)

2. The Commission Must Enforce the Public Utilities Code When a Utility Participates in its Violation

Section 2101 is clear: the Commission "shall see" that all laws of this State "affecting public utilities" are enforced. This includes, *a fortiori,* the Public Utilities Code.

a. Comcast Phone Violated Sections 2891 and 2891.1 of the Public Utilities Code

Comcast's Brief acknowledges that "Section 2891.1 on its face applies only to telephone corporations" and does not deny that Comcast Phone is a telephone corporation.[242] Comcast's threshold argument is that the Commission "cannot extend [section 2891.1's] requirements to a VoIP provider or VoIP service."[243] Comcast does not mention that it is not the VoIP entity, but Comcast Phone, that has the central role of distributing and licensing the directory listings at issue, as reflected in the Directory Listing License and Distribution Agreement (DLLDA) between Comcast and Targus.[244] Nowhere in that agreement is there any mention of Comcast IP. The contracting parties are Comcast Cable Communications Management, LLC on behalf of itself and its LEC Affiliates, referred to as Comcast throughout the agreement, and Targus Information Services.[245] The signature block is for Comcast Phone LLC.[246] Comcast Phone LLC is

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> their homes are private, and will be used by the telephone company only for billing purposes.

See also, Resolution No. L-272, *Re Public Records Act Request*, 1998 Cal. PUC LEXIS 1123, applying Article 1, section one balancing test set forth in *Hill v. NCAA;* Resolution No.: L-436, 2013 Cal. PUC LEXIS 183 (same).

[242] Comcast Brief, at 33, 36-37; *see also* OII, at 12-13, 15-16.

[243] Comcast Brief, at 33.

[244] OII at 6-7, *citing* Exhibit SED 1C, Staff Report, at 7-10 and **Attachment 11.**

[245] SED Exhibit 1C, Staff Report, **Attachment 11**, at p. 1.

[246] *Id*., at 12; *see also* OII, at fn. 25 (Recitals in DLLDA).

the parent of Comcast Phone of California, LLC, the certificated carrier in California (U-5698-C). [247]

Comcast then raises two technical objections to the applicability of section 2891.1, the analysis of which only confirms the applicability of section 2891.1.

i) Comcast Phone Licenses Customer Lists

Comcast first tries to get around the centrality of Comcast Phone's role here by arguing that "Section 2891.1 does not apply where, as here, a regulated telephone corporation did not sell or license *its own* non-published listings."[248] As a threshold matter, this assertion does not square with the language of section 2891.1, which states only that a "telephone corporation selling or licensing lists of residential subscribers shall not include" non-published numbers. There is no reference in the statute to the ownership of those numbers. Nor is there such a reference in the DLLDA, or the Local Interconnection Service Agreement (LIS or Interconnection Agreement).[249] Rather, the DLLDA states that Targus will serve as Comcast's Distribution Agent; as noted above, Comcast is defined as the Cable Management company on behalf of Comcast Phone.

Comcast then objects that it is not Comcast Phone that "assigns" the number to a subscriber, but Comcast IP, from compliance by section 2891.1(h),[250] which defines an

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[247] *See* Exhibit COM 101C, Munoz Direct Testimony, **Attachment B** (Comcast Organizational Chart).

[248] Comcast Brief, at 33.

[249] Local Interconnection Service Agreement, found at Staff Report **Attachment 10** (Exhibit SED 1).

[250] Comcast Brief, at 35. Staff believes that Comcast IP also falls within the definition of a telephone corporation (section 234) because it operates telephone lines (section 233) that facilitate communication by telephone, contrary to Comcast's assertion otherwise. Comcast Brief, at 35. In 2004, in Investigation (I.) 04-02-007, *Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice Over Internet Protocol Should be Exempt from Regulatory Requirements*, the Commission tentatively concluded that "those who provide VoIP service interconnected with the PSTN are public utilities offering a telephone service subject to our regulatory authority." I.04-02-007, Slip. Op., at p. 4. In reaching this tentative conclusion, the Commission analyzed the functionalities of VoIP, especially from the end-user's perspective, and interpreted VoIP service providers to fall within the definition of a public utility telephone corporation pursuant to sections 216 and 234. Subsequently, in 2011, in Rulemaking (R.), 11-01-008, *Order Instituting Rulemaking on the Commission's Own Motion to Require Interconnected Voice Over Internet*

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"access number" as one "assigned to a subscriber by a telephone or telegraph corporation."[251] This elevates form over substance. The assignment of telephone numbers to Comcast's customers starts with Comcast Phone and cannot happen without Comcast Phone. Comcast concedes as much:

> Comcast IP obtains telephone numbers through Comcast Phone because historically under the rules of the Federal Communications Commission ("FCC"), the North American Numbering Plan Administrator ("NANP") was permitted to provide telephone numbers only to certificated telephone companies or wireless carriers. Under those rules, VoIP service providers such as Comcast IP could not obtain numbers on their own.[252]

Regardless of whether or not Comcast IP actually "assigns" the telephone numbers to Comcast's residential subscribers – and there is no direct evidence that it does, or that it has any real corporate existence, or that Comcast Phone has transferred the number lots it receives from NANPA to Comcast IP – such an assignment could not happen without Comcast Phone's essential role in what might be called a chain of assignment. As the DLLDA illustrates, it is Comcast Phone, not Comcast IP, who licenses the directory listings to third parties.[253]

Protocol Service Providers to Contribute to the Support of California's Public Purpose Programs, we reached the same tentative conclusion that "interconnected VoIP service providers fall within the broad definition of "telephone corporation." R.11-01-008, Slip Op., at p.27. While these tentative conclusions were never adopted in final Commission decisions, SED is unaware of any Commission decision that concludes otherwise. Neither section 239 nor section 710 alter or amend the relevant definitions of "public utility" (section 216), "telephone line" (section 233), or "telephone corporation" (section 234) that govern the analysis here, although they may preclude the exercise of regulatory authority over VoIP services aimed solely at Comcast IP.

[251] *See* Comcast Brief, at 35.

[252] Exhibit COM 101, Munoz Rebuttal Testimony, at 13:21-25.

[253] The legislative history cited by Comcast actually shows that the Legislature rejected the ownership limitation for which Comcast argues. As Comcast recites, the "bill summary explains that the provision 'would specifically prohibit a telephone corporation which sells lists of ***its*** residential subscribers from including the telephone number of any subscriber with an unpublished or unlisted access number.' " Comcast Brief, at 34-35. The Legislature chose not to include the word "its" in the final statutory language.

Moreover, the harm experienced by customers is precisely the harm foreseen by the Legislature: once the non-published numbers were breached, customers quickly found themselves besieged by telemarketing calls,[254] precisely the harm which the Legislature sought to prevent. Even if business operations in 2010-2012 were much more sophisticated than they were during the 1989-90 legislative session, before the advent of online directories and "big data," the general threat to privacy was the same. The publication of non-published numbers, and their licensing to companies that in fact operate as data marketers, violates section 2891.1, and in any event cannot be considered "just and reasonable" under section 451.

ii) The Interconnection Agreement Governs Directory Listings

Comcast's next tack is to claim that, "under the LIS [Local Interconnection Service] agreement that governs Comcast Phone's provision of local interconnection service to Comcast IP, neither the provision nor monitoring of the accuracy of non-published listings is part of the interconnection service that Comcast Phone provides."[255] Indeed, Comcast argues that it was Comcast IP who was responsible for "entering, validating" and "maintaining correct subscriber listings information" and therefore Comcast Phone cannot be held liable for the violation of 2891.1.[256] It is not, however, the "entering, validation, or maintaining" of the subscriber list information that is at issue, but "selling or licensing lists of residential subscribers" by the telephone corporation. Comcast Phone's licensing of subscriber lists to Targus was done as part of its contractual obligation to provide "directory listings" pursuant to Comcast Phone's Interconnection Agreement with its "customer" Comcast IP. The Interconnection Agreement sets forth Comcast Phone's provision of LIS to Comcast IP:

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[254] See e.g., Exhibit SED 2C, Momoh Opening Testimony, **Attachment Z**.

[255] Comcast Brief, at 37.

[256] *Ibid*.

[redacted][257].

In other words, Comcast Phone provided all essentials of a traditional, regulated TDM phone service, a phone service which Comcast IP took and translated into a more lightly regulated IP service.[258] This stark division between TDM and IP is reflected in this further passage from the Interconnection Agreement:

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[257] Local Interconnection Service Agreement, found as **Attachment 10** to Staff Report (Exhibit SED 1), at page 2, ¶ 1.2(A) and (D) (emphasis added).

[258] Here we arrive at a complex engineering question which, fortunately or unfortunately, is often accepted as marking the frontier between the regulated world of traditional telephony and the unregulated or much more lightly regulated world of IP, in the wake of the FCC's 2002 *Cable Modem* decision and legislation like SB 1161. As the Commission stated in 2013 Comments to the FCC:

> Time-Division Multiplexing (TDM) is a circuit-switched technology used to provide what is commonly referred to as traditional wireline telephone service or "plain old telephone service" (POTS); it is usually delivered to customers over twisted pairs of copper wires called "copper loops," which provide the final link between the service provider's network and the customer's premises. Versions of TDM are also used on wireless networks. Internet Protocol (IP)-based services are those that typically travel over fiber optic cables, co-axial cables, wireless facilities, and DSL copper wires, but use an Internet-based technology in lieu of switched circuits to deliver traffic. While TDM and IP transmissions are both digitized, IP is packetized in a way that allows the packets to travel over multiple routes to the called party or terminating address.

CPUC July 8, 2013 Comments on FCC Technology Transitions Policy Task Force Potential Trials, and AT&T Petition re TDM-IP Transition, GN Dockets 13-5 and 12-353 respectively, at footnote 2, available at http://apps.fcc.gov/ecfs/document/view?id=7520929101. While engineers may quibble with these definitions, SED believes they provide a serviceable introduction to the distinction between TDM and IP. *See also* NEWTON'S TELECOM DICTIONARY, 24th Ed., 2008, at 506 (IP) and 908 (TDM), or various filings in the above-identified FCC dockets.

> The IP-based, broadband connecting facility between Customer and Subscribers, the CMTS, the soft switch, the connecting facilities to the Company's media gateway, and all customer premises equipment must be provided by the Customer or its Subscribers *and* ***is not included*** *as part of LIS. The Company [Comcast Phone] will only accept and deliver traffic in time division multiplex ('TDM') protocol.* [259]

Although it is doubtful whether the factfinder can consider the Interconnection Agreement between two Comcast subsidiaries an arms-length agreement, or anything other than a work of fiction to achieve some deregulatory arbitrage, this is Comcast's agreement and Comcast is estopped to deny the assertions of its own intra-corporate "contract."

iii) Comcast Violated Sections 2891.1 and 2891 of the Public Utilities Code

Section 2891.1(a) addresses the privacy interests implicated when a customer specifically requests and pays for an unlisted or non-published phone number, stating in relevant part:

> Notwithstanding Section 2891, a telephone corporation selling or licensing lists of residential subscribers shall not include the telephone number of any subscriber assigned an unlisted or unpublished access number.

That is precisely what happened here. A telephone corporation, Comcast Phone, licensed lists of residential subscribers to at least one third party, Targus/Neustar (which then sub-licensed those lists to kgb and possibly other third parties), and those lists in fact did include the telephone numbers and other subscriber information associated with unlisted or unpublished access numbers. Comcast admits this was a mistake. SED believes there are actually two violations of section 2891.1 involved here.

[259] *Id.* at ¶ 1.2(B).

Comcast regularly included the name, address and telephone number of unlisted and non-published numbers in the subscriber lists it sent to Targus. That is violation number one. This violation goes back at least as far as 2009, when Comcast internal documents reflect a management decision to send non-published numbers to Targus and other third parties, apparently over staff objections.[260] Further, even if this "Process Error" did not affect Comcast's data feed to LSSi, Comcast nonetheless violated this statute in its provision of non-published listings LSSi. Ms. Donato admits that,

> For LSSi (who acted as our agent for distribution of listings for some period of time), we sent the non-published listings (with the proper indicators or flags).[261]

This situation is particularly alarming because Comcast has no idea what LSSi, a data broker and bad actor by its own description, did with the subscriber listings that Comcast fed to it.[262]

Violation number two is Comcast's failure, even within this construct, to properly flag the accounts of non-published numbers with their non-published status. This is what Comcast refers to as the "Process Error."

Comcast also violated section 2891. Section 2891 makes it illegal for a carrier to release, without first obtaining the residential subscriber's consent in writing, any "demographic information." Name attached to a street address and telephone exchange is clearly "demographic information."[263] Sections 2891 and 2891.1(a) incorporate the principles and values of the California Constitution. Located in a section entitled "Customer Right of Privacy," at Part 2, Chapter 10, Article 3 of the Code, they provide

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[260] *See* SED Brief, at 59-63.

[261] Exhibit COM 104, Donato Rebuttal Testimony, at 14.

[262] *See* Exhibit COM 107, Miller Rebuttal Testimony, at 8-11 ("LSSi would not provide us with a list of third-parties to whom they had licensed Comcast's DL Information nor would they affirm that they had complied with the use of restrictions set out in Section 3.1 and 7.3 of the LSSi Contract. As a result, I came to believe that they were selling our DL Information indiscriminately." *Id*, at 9.).

[263] *Compare* D.98-01-057, Slip Op., at 1-2 (*anonymous* address alone not "demographic information" within meaning of Section 2891).

complementary protection for the privacy of telephone customers. While the OII and much of staff's effort in this case has focused on Comcast's violation of section 2891.1, the Scoping Memo appropriately includes 2891 as well.[264] As SED pointed out in its Opening Brief, statutes such as these which are designed to protect consumers are generally considered to be "strict liability" statutes.[265]

b. Comcast's Failure to Make Adequate Disclosures to Consumers Violated Section 451 - and the Commission's General Order 168, as well as other California Laws

In its Opening Brief, SED addresses four distinct ways that Comcast failed to provide "just and reasonable" service in violation of section 451: (i) Comcast's imposition of a charge for a service not rendered; (ii) Comcast's massive release of non-published subscriber information; (iii) Comcast's failure to monitor and protect consumer information downstream; and (iv) Comcast's failure to provide just and reasonable disclosures and sufficient information related to the non-published service.[266] Comcast addresses section 451 only with regard to (ii) the Breach itself, what Comcast now claims were its "reasonable processes." It is only the latter point that Comcast addresses.

Comcast addresses two arguments: (1) the patently untenable claim it "had reasonable processes and procedures in place to prevent the disclosure of non-published listings"; and (2) that it had "reasonable processes for addressing customer concerns about non-published service," i.e., complaints, alleging that the "number of customer calls and trouble tickets … did not suggest a systemic issue."[267] These are factual issues in disguise, and are addressed above.

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[264] February 11, 2014 Assigned Commissioner's Scoping Memo and Ruling, at 3.

[265] *See* SED Brief, at 94, and fn. 334.

[266] SED Brief, at 95-99.

[267] Comcast Brief, at 38-39.

SED will stand on its previous discussion of charging for a service not rendered, and failing to monitor and protect consumer information downstream, as set forth in its Opening Brief (and in SED's testimony).[268]

That leaves disclosures. Although Comcast skips any legal discussion of its disclosures, it provides a factual discussion with embedded legal conclusions, alleging for example that it "clearly advises customers about its policies for its non-published offering … and the limitations of such status."[269]

Comcast's disclosures were not clear, nor were they just or reasonable, in two primary aspects: (1) they failed to meaningfully alert non-published customers to the limitations of non-published service; and (2) they failed to provide Comcast customers generally with sufficient information to make informed choices, as required by sections 451 and 2896. As noted above and in SED's Opening Brief, customer confusion is engendered by the claim that non-published numbers "ensure" privacy, which is then taken away in the fine print. Customer confusion is also caused by Comcast's online Directory Listing Guidelines, which advertise "If you want to keep your telephone number private, you can request 'non-published status.'"[270]

As noted in SED's Opening Brief, section 2896 requires that customers receive "sufficient information … to make informed choices among telecommunications services,"[271] and General Order 168 provides that consumers "have a right to receive

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[268] SED Brief, at 95.

[269] Comcast Brief, at 17-20.

[270] Exhibit SED 5, Christo Opening, at **Attachment C**; also found at Exhibit SED 1, Staff Report **Attachment 18**. Similarly, when Comcast rolled out Ecolisting, Comcast assured its non-published customers that they would "not see a change to their status. Comcast will continue to ensure that non-published customers' names and telephone numbers *are not distributed to phone book publishers, online directories or directory assistance.*" *Id.* at **Attachment 19** (emphasis added). While this is a blatant misrepresentation of Comcast's actual practices, staff concedes that it did not ascertain how long and widely this document, which is apparently a bill insert, was distributed. At least one customer appears to have received it. *See* John Doe 8, **Attachment P.8** to Momoh Opening, Exhibit SED 2, at ¶3. In this document, Comcast also acknowledges that published listings "may also appear in other on-line directories and directory assistance (411) databases, as well as printed directories."

[271] *See* SED Brief, at 119, fn 377, *citing* P.U. Code § 2896(a); *see also* discussion at 98 (fn. 340) of D.04-

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clear and complete information about all material terms and conditions, such as material limitations," for products and service plans they select or which are available.[272]

Omissions or failure to clearly present material limitations about a product or service can constitute deceptive practices, which violate standards developed under Business & Professions Code §§ 17200 and 17500, and cannot be considered "just and reasonable."[273] The test is whether the reasonable consumer is likely to be misled,[274] which is another way of saying that the customer will not have sufficient information to make an informed choice about non-published service, the standard under the Public Utilities Code.[275]

In addition, the fine-print Privacy Notice and Customer Agreement, which are merely handed to a subscriber at service installation, must be considered as "contracts of adhesion," which would also not meet the "just and reasonable" standard.[276] The Commission has repeatedly expressed an aversion to fine print qualifications or limitations to more widely touted offers. [277] As the Commission said in its *Cingular* decision:

09-062; see in particular Slip Op., at 56 ("disclosures … insufficient to permit customers to make informed choices … do[es] not meet the just and reasonable service mandate of § 451, and cannot meet an objective interpretation of the duty owed to customers under § 2896(a)").

[272] SED Brief, at 99.

[273] *See Schnall v. Hertz Corp,* 78 Cal. 4th 1144, 1167 (2000) (disclosing otherwise lawful fuel service charge in a separate document could be deceptive); *People v.Dollar Rent-A-Car Systems, Inc.* 211 Cal. 3d 119 (1996); *Simeon Management Corp. v. FTC* 479 F.2d 1137, 1145 (9th Cir 1978) (failure to disclose material facts may cause product materials to be "deceptive").

[274] *Schnall v. Hertz, supra; see also Bank of the West v. Sup. Ct.* 2 Cal. 4th 1254, 1267 (1992)

[275] P. U. Code §§ 451, 2896; *see also* D.04-09-062 (*Cingular*), *supra.*

[276] *See, e.g.,* D.10-06-001 (quoting Commissioner Brown):

> Standard form contracts presented to the customer in "take it or leave it" fashion are called contracts of adhesion. The law knows that they are not real contracts in the sense that there is a meeting of the minds of the parties. Commercial necessity and efficiency require that such "take it or leave it" contracts be accepted as if there were a real agreement.

See also D.04-09-062 (*Cingular*) (same).

[277] In *Coral Communications*, D.01-04-035, the Commission found that Coral Communications, Inc. (Coral) had placed nearly $ 6 million of unauthorized charges on the local telephone bills of over

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> A review of decisions spanning several decades reveals that, as relevant here, the Commission has interpreted § 451's reasonable service mandate to require, for example, that utilities provide accurate consumer information by a readily accessible means, … and ensure their representatives assist customers by providing meaningful information about products and services.[278]

Because of the unique properties of privacy protection, the traditional parameters for just and reasonable disclosures have been overlaid in the privacy field with specific requirements for "notice and choice."[279] Here, Comcast has failed to provide reasonable notice or disclosure of the true risks to which its subscribers – published and non-published alike – are submitting by the mere act of being Comcast customers, and thus even if there were a "choice," a clear means to opt out of Comcast's information sharing (there is not), such a choice would be meaningless because the customer would lack the requisite information to exercise that choice.[280]

Comcast may be expected to argue that the disclosures to its VoIP customers are something apart from the regulated utility's procurement of number resources and

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250,000 Californians. Coral based these charges on sweepstakes entry forms that contained purported authorizations in the fine print. Slip Op., at 27. In D.01- 07-026, re GO 96 rules for tariffs, the Commission stated that "[t]he 'fine print' should not be a trap for the unwary customer, and we have concluded that it is time to apply this principle to tariffs."

[278] See *Higginbotham v. Pacific Bell*, D.02-08-069, 2002 Cal. PUC LEXIS 487 [ceasing white pages publication of local call pricing information, including toll call prefixes, unreasonable under § 451]; *UCAN v. Pacific Bell*, D.01-09-058, 2001 Cal. PUC LEXIS 914**,** ltd rehrg D.02-02-027, [misleading or potentially misleading marketing tactics unreasonable under § 451]; *First Financial v. Pacific Bell,* D.98-06-014, 1998 Cal. PUC LEXIS 489 [§ 451 requires utility to disclose to business customers all service options that meet customers' needs]; *National Communications Center Corp. v. PT&T Co.,* D.91784, (1980) 3 CPUC2d 672 [utility owes customers responsibility to provide all available and accurate information customers require to make intelligent choice between similar services where choice exists]; *H.V.Welker Inc. v. PT&T Co*, D.75807, (1969) 69 CPUC 579 [utility has duty to ensure its representatives inform business customers of options available to meet customers' needs].

[279] *See* Hoofnagle and Urban, "Alan Westin's Privacy *Homo Economicus,*" 49 Wake Forest L.Rev. 261, 261 (2014), available at http://scholarship.law.berkeley.edu/facpubs/2395/; *see also generally* Exhibit SED 4, Tien Testimony.

[280] Comcast claims that they now no longer send name and address of non-published subscribers to Targus, but they appear to send the non-published telephone number. In any event, this is a policy that Comcast could reverse tomorrow. ----------

distribution and licensing of directory lists. SED notes in response the significant level of control that Comcast Phone appears to exercise over Comcast IP, as reflected in the Interconnection Agreement, which demonstrates that Comcast Phone knew or should have known about the disclosures or lack of same made by Comcast IP.[281] The regulated utility can be ordered not to provide interconnection services to the unregulated affiliate unless and until adequate disclosures are made.[282]

D. Penalties Are Required to Address Egregious Conduct and Deter Such Conduct in the Future

Unsurprisingly, Comcast argues that "no penalty should be imposed" because of numerous mitigating factors."[283] Comcast advances several specific arguments against penalties: (1) precedent does not support them; (2) mitigating factors argue against them; (3) there is "no unaddressed serious harm"; (4) penalties are not necessary for effective deterrence in this case; and (5) the totality of the circumstances weigh against it.

In its Opening Brief, SED provided an ordered and fairly complete analysis of the factors that the Commission usually considers in weighing fines or penalties under P.U. section 2107,[284] and then discussed how the penalty could be more particularly specified using Sections 2108 and 2111,[285] as set forth in the Briefing Outline. Because the Briefing Outline was rather abbreviated in relation to penalties, SED will in this Reply Brief follow the order of Comcast's argument.

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[281] Exhibit SED 1, Staff Report, **Attachment 10**, at Section 1.5 ("Customer Responsibilities").

[282] *See*, *e.g.*, P.U. code § 710 ("The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which is necessary and convenient in the exercise of such power and jurisdiction."); *see also* § 451 (just and reasonable service "as necessary to promote the safety, health, comfort and convenience…of the public).

[283] Comcast Brief, at 40.

[284] *See* SED Opening Brief, at 105-113, discussing: (a) severity of the offense (number/scope of violations, resources of utility, economic harm, and harm to the regulatory process); (b) Comcast's conduct (intentional decisions, lack of prevention and detection, delayed disclosure and incomplete remedies); (c) the public interest and the need for deterrence; and (d) precedent.

[285] *Id.*, at 114-18, discussing calculation of the penalty under section 2108, and the liability of affiliate entities under section 2111.

1. The Penalty Recommended by SED Is Consistent with Precedent

Comcast opens with the assertion that the "Commission first must ensure that any penalty it contemplates imposing is consistent with precedent."[286] Although usually one of the last parts of a Commission penalty analysis, after the Commission establishes the severity of the offense and the presence or absence of mitigating factors, SED will follow Comcast's lead in this regard.

While SED discussed three relevant cases of large-scale utility misconduct that negatively affected consumers,[287] and distinguished the relatively smaller and contained *Cox* case, Comcast focuses on just two precedents, the *Cox* case and a case (*Knell*) that involved only one consumer.[288]

There are major factual and contextual distinctions between the decisions that Comcast cites and the present proceeding, and when viewed in the appropriate context, these decisions actually support a substantial fine here. As a preface, the two cases cited by Comcast were decided over 10 years ago, and do not account for the hyper-connected digital world in which carriers operate today.

Cox involved first Resolution T-16432, in which Cox proactively and robustly sought to protect its customers, as discussed above (in section III.G.2). A year later, the Commission issued D.01-11-062 as a sort of final decision on Cox's inadvertent release of 11,478 customers' non-published listings. This rulemaking, which did not have the benefit of being marshalled through the adversarial process by the Commission's enforcement branch, involved a much smaller breach that was addressed with a more comprehensive response by Cox (as described in more detail above).

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[286] Comcast Brief, at 41.

[287] SED Brief, at 112-13.

[288] *OIR into Competition for Local Exchange Service (Cox),* D.01-11-062; *Knell v. Pacific Bell and AT&T*, D.03-08-025.

First, the dissemination of the "tainted" White Pages directories were limited to *printed* copies that were disseminated to the South and East San Diego region.[289] By contrast, the breadth of Comcast's dissemination is as vast as the universe of Internet users. Comcast's breach is not restricted to a finite number of tangible directories that can be collected, destroyed and replaced, or that will soon become obsolete.

Second, Cox was able to quantify the number of tainted directories that were disseminated to the segment of the San Diego service area, and responded with significant efforts to remove the directories. By contrast, given the digital nature of the Breach, Comcast did not and cannot simply retrieve and replace its electronically disclosed directory listings, nor did it make any attempt to use its "online site removal" process, as discussed above. Rather than attempt to quantify the extent or impact of the Breach, Comcast has engaged in obfuscation and delay. [290]

Lastly, although the Commission declined to impose a penalty against Pacific and Cox, it reached this conclusion not only because of the aforementioned reasons, but in light of the over $15 million the two utilities collectively spent in responding to the tainted directories.[291] Comcast has provided no such accounting here.

Knell, the second authority that Comcast cites, similarly supports a significant penalty here. *Knell* has its origins in service quality issues which led the *lone* complainant to move his four telephone lines from Pacific Bell Telephone Company ("Pacific") to AT&T Communications of California, Inc. ("AT&T").[292] After the transition to AT&T, the individual complainant continued to experience service quality

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[289] D.01-11-062, Slip Op., at 6.

[290] *See* SED Brief, at 10-19.

[291] *Id*., at 22. The Commission also noted that: "the $13 million in costs Cox claims to have incurred as a result of the tainted directories represent as substantial a deterrent as any fines we would be likely to impose under § 2107." *Id.,* at 19.

[292] D.03-08-025, Slip Op., at 3.

problems, incorrect billing, and the publishing of his home address with his business listing.[293]

Although the Commission declined to fine AT&T for violating § 2891.1, it did express its concern over consumer privacy when it ordered AT&T to provide a compliance report to Telecommunications Division providing, among other things, the number of complaints received by AT&T alleging the release or publishing of non-listed or non-published information:

> [W]e are concerned that AT&T lacks sufficient controls to prevent the release and publishing of non-published residential numbers and addresses. If releasing this information is a widespread problem, we will open an investigation to address violations of § 2891.1 and customers' privacy.[294]

The Commission went on to acknowledge the penalty figure it would likely entertain for the discovered violations had they been *widespread* violations of the Commission's rules and regulations:

> Complainant recommends we assess $23 million penalties for violations of our rules and regulations. We impose substantial penalties, *as requested by Complainant*, where we have found *widespread* violations of our rules and regulations, but this case does not provide a basis for such findings.[295] (emphasis added).

Comcast's Breach is exactly the type of 'widespread violations' that the Commission recognized in *Knell*. Contrasting starkly with *Knell*, where there was only one main violation of § 2891.1, here we have approximately 75,000 victims and

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[293] *Ibid*.

[294] *Id.,* at 15.

[295] *Id*., at 22.

thousands of violations (if measured per day per violation – see chart at page 117 of SED's Opening Brief).

2. Comcast's Asserted Mitigating Factors – Voluntary Reporting, Rectification, and "Full Cooperation" – Are Insignificant in Light of Comcast's Failure to Prevent and Detect the Breach

In the standard Commission penalty analysis, there are four "mitigating" or exacerbating factors: the utility's efforts to prevent, detect, disclose, and remedy the violation.[296] Comcast focuses only on the latter two (if one considers "cooperation" with regulated affiliates an effort to remedy the violation).[297] Comcast's Opening Brief omits any analysis of the first two factors, prevention and detection, which are *the* crucial consideration in this Investigation. Comcast's Brief tacitly concedes that it failed to apply the most elementary data security measure there is, the "spot check."[298] Whether this was ineptness or some intent that staff has been unable to uncover,[299] a large fine is appropriate.

Comcast argues that it "proactively disclosed its discovery of the Process Error" to the Commission and the California Attorney General. One could ask what other course of action it had. When Comcast finally came to the Commission, almost two months had passed since it became aware it had a systemic problem on its hands. By contrast, Cox was in the Commission offices within days of the discovery of its Breach.[300]

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[296] D.98-12-075; *see also New Century Telecom* (D.06-04-048), *Golden State Water* (D.07-11-037), and *Edison* D.08-09-038.

[297] Comcast Brief, at 43-44.

[298] *Id.*, at 23 ("After discovering the Process Error, Comcast conducted five manual spot checks of affected telephone numbers").

[299] The way the decision was made to send non-published subscriber information to third parties suggests that there may have been a business motive or *quid pro quo* with directory publishers or data aggregators. *See* SED Opening Brief, at 59-62.

[300] *See* Resolution T-16432, Finding of Fact 5 and 11 (discovery on May 4, meeting with staff on May 17, 2000).

Comcast argues two aspects of "redress" it provided to affected customers: (1) it asserts that it has "implemented numerous improvements in its processes in order to prevent future inadvertent releases"; and (2) it suggests, by comparison to *Cox,* that it also "remove[d] the listings from circulation."[301] These assertions fail for the reasons described above: (1) the alleged improvements pale in significance to the abject failure to have these processes in place when it counted; and (2) Comcast's remedial effort fell far short of what Cox brought to the table in a much smaller breach.

Although Comcast claims that it "cooperated with the investigations," and has at times provided the sheen of cooperation, SED's discussion of Comcast's Rule 1 violations puts any suggestion of "cooperation" to rest.[302] Indeed, one could argue that Comcast actively obstructed this Investigation.[303]

3. Contrary to Comcast's Contention, there is Serious, Long-Term, and Probably Irreparable Harm Caused by its Breach of its Customers' Privacy

Comcast is in denial. It "does not dispute that the Release caused substantial concern for consumers," but maintains there's no evidence "that customers suffered physical or economic harm that Comcast did not redress or offer to redress."[304] Maybe Comcast did not note the anguish in Jane Doe 11's voice at hearing, or read the fear in Jane Doe 10's Declaration.[305] Perhaps it failed to consider that Jane Doe 11 paid out of her own pocket for "online" removal of her information, and was only later reimbursed by Comcast, only to find that the online removal service had not been effective in removing her home phone number and address (complete with map) from the Internet.[306] Or maybe

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[301] Comcast Brief, at 43.

[302] *See* SED Brief, at 10-19, 101-103.

[303] *Ibid.*

[304] Comcast Brief, at 44.

[305] Exhibit SED 3, Momoh Rebuttal, at **Attachment B.**

[306] HT (Jane Doe 11) at 159:14-16; *see also* Exhibit SED 2C, Momoh Opening, at confidential **Attachment V** (maps to Declarants' homes).

Comcast was not able to put a value on the thousands of hours that Comcast customers spent on the phone with it, trying to understand what had happened and what the implications for them were.[307]

The Commission recently recognized in D.14-08-009, "The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions."[308] This in turn points to a central aspect of this case: the harm is irreparable, the "genie is out of the bottle."

4. A Penalty Is Necessary for Deterrance

The fact that Comcast was unable to detect the violations for over two and one-half years smacks of poor internal control. This, more than any other factor in this case, is not only inexplicable, but also grounds for the Commission to assess a substantial penalty against Comcast. It simply had no mechanisms in place to detect the Breach. In aggravation, Comcast was using a new Table (if not an entirely new system) to flag non-published accounts as private, but never checked to see if that new table was working. The one thing that Comcast got right was that it continued to bill these customers for the entire two-and-one-half year duration of the privacy Breach.

The Commission can also weigh the fact that Comcast apparently had no system to monitor incoming consumer complaints and escalate those as soon as a pattern established itself. Indeed, quite the opposite was true. Jane Doe 10 called into Comcast on multiple occasions in 2011 and 2012, two different years, about the same problem, and Comcast still could not figure out that there was a systemic problem. Email correspondence attached to Doe 10's Declaration also demonstrates how unresponsive Comcast customer service was.[309] Comcast is very lucky that no one here was assaulted or injured after being exposed by Comcast's ineptitude (as far as staff knows, but Comcast

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[307] *See, e.g.*, Exhibit SED 2, Momoh Opening, at pp. 12-23.

[308] D.14-08-009, Slip Op., at 9, *citing* D.98-12-075, 84 CPUC 2d at 188-190.

[309] Exhibit SED 3, Momoh Rebuttal Testimony, **Attachment B**.

prevented staff's full access to the victims). This in no way lessens the need for a significant penalty. In the *Edison* case, where there was no physical injury and no easily quantifiable economic harm, the Commission decided that a $30 million fine against Edison was warranted in order to deter such conduct (essentially gaming the utility regulatory system) in the future:

> The purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others. For this reason, fines are paid to the State of California, rather than to victims. … **Effective deterrence creates an incentive for public utilities to avoid violations**.[310]

As California heads into a world where electronic communications carriers provide an ever more essential part of our lives, and are positioned to harvest previously unthinkable reams of data from their customers, the risk of negligent leaks of private data to ever-hungry data brokers only grows proportionally. A substantial fine and its deterrence are required to underline that carriers *must* establish strong internal controls commensurate with the privacy wishes of their customers.

The Commission has recognized that effective deterrence requires the Commission to set a fine that weighs the financial resources of the utility against the constitutional limitations on excessive fines.[311] In doing so, the Commission has further recognized that: "[s]ome California utilities are among the largest corporations in the United States and others are extremely modest, one-person operations. What is accounting rounding error to one company is annual revenue to another."[312]

Although Comcast claims that the amount of resources and energy that it has expended over the past two years serves as powerful deterrent, it has not provided an

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[310] D.98-12-075 (84 CPUC2d 155, 182-85) (emphasis added), as cited in D.08-09-038, 2008 Cal. PUC LEXIS 401, at *142.

[311] D.98-12-075, 1998 Cal PUC LEXIS at*59.

[312] *Ibid*.

accounting of its expenditures, nor does it provide any information regarding its substantial financial resources. As SED pointed out in its Opening Brief, Comcast's resources are vast.[313] In light of Comcast's substantial resources, to have any deterrent effect, the Commission must impose a substantial fine against Comcast.

5. The Totality of the Circumstances Requires a Penalty

Comcast uses this section to rehearse its good citizen credentials with a catalog of arguments it has made throughout this proceeding: the privacy Breach was "inadvertent"; Comcast did not profit from it; Comcast "acted quickly to investigate and correct" the Breach once it was discovered (two and a half years after it occurred); it "implemented an active notification plan" to inform affected customers; it credited affected customers; and it implemented "a number of process and system improvements" after the Breach.[314] Staff's response to this catalog is first "not quite," and then "so what?" Unlike in *Cox,* we still have no report from an outside expert, or indeed any report (Comcast claims to be doing an internal audit).[315] Notification and restitution are still incomplete. Comcast had the use of collected non-published fees for two-and-a-half years.[316] And the fact that the Breach may have been inadvertent is irrelevant in the analysis of "police power" statutes designed to protect the public at large.

A counter-catalog is obvious: Comcast failed to detect the Breach for 28 months; it continued to bill its customers that whole time for non-published service, while failing to provide the service itself; it regularly sent non-published numbers to third-party data aggregators (even if there were supposed contractual protections in place), and it utterly

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[313] Opening Brief at 107-08. Comcast's SEC filings demonstrate that it is among one of the largest corporations in the United States. In fact, Comcast ranks 44th on Fortune's list of Fortune 500 companies. *See* http://fortune.com/fortune500/comcast-corporation-44/.

[314] The "totality of the circumstances" analysis often leads the Commission to revisit facts that tend to mitigate the degree of wrongdoing, as well as facts that exacerbate the wrongdoing. D.98-12-075, 1998 Cal PUC LEXIS at*59.

[315] HT at 434:17-26.

[316] Although a relatively minor sum, there's no evidence that Comcast returned interest on those fees.

failed to disclose this reality to its non-published customers; indeed, it provided no effective disclosure of the data markets to which all of its customers were exposed by the mere act of subscribing to its service; it had a record of other, and previous, breaches, and failed to implement even the simplest of methods -- spot checks -- to ensure that such breaches were not continuing; and it simply ignored complaint after complaint from customers who found to their dismay that their numbers were published on the Internet, in paper directories, or in directory assistance.

On balance, Comcast's inaction for two and a half years, and its inadequate actions since, has only aggravated its wrongdoing. And this, at a time when experts urge that consumers be given more, and more effective, choices with regard to their privacy.[317] The totality of the circumstances counsels a large penalty in this case.

V. CONCLUSION

Comcast's Opening Brief reflects a strategy of minimization. Comcast's presentation of its case reduces its breach of the privacy of 75,000 Californians to an "Anomaly in a Data Extraction Process."[318] It only makes glancing reference to the safety or well-being of the 75,000 affected customers.[319] Its explanation for the 28 months between Breach and discovery was that it was so busy helping customers, many of whom had to call back multiple times in an attempt to resolve their issue, that it did not have the time to do a root cause analysis before November 2012 – even though an internal 2009 memo highlights the importance of root cause analysis." It ignores the large public debate about privacy that has grown in scope and intensity as "big data" has become a reality in our lives.

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[317] There have been many treatises in the last several years regarding the importance of disclosure, *Big Data: Seizing Opportunities and Preserving Values* (May 2014), available at http://www.whitehouse.gov/issues/technology/big-data-review.

[318] Comcast Brief, at 6, 11, 12.

[319] Comcast refers to customer safety only on two pages of its Opening Brief, 22 (a "specialized team" to address escalated customer issues) and 43 (in an unspecified number of cases, Comcast reimbursed customers with "unique safety concerns"), but in both cases, these were after-the-fact remedial exercises, rather than prevention and detection activities.

Instead, Comcast argues essentially (and incorrectly) that the Commission has no jurisdiction to do anything about the privacy breach affecting 75,000 California telephone customers. It also cites to obscure sections of federal law, the fine-print provisions of its terms and conditions, and the good-citizen spin on its efforts to contain the fallout from the Breach. Comcast cannot have it both ways – enjoy the benefits of its status as a regulated telephone carrier (access to numbering resources, pole attachments, and interconnection agreements), but liability based on the protocol by which it delivers service to its end users.[320]

Commission decision makers should not be distracted by any of this. There was a major privacy Breach here, involving a core, regulated telephone service. More fundamentally, there was close to complete disregard among Comcast management – except for a few employees who tried to warn about inadequacies and dangers of Comcast's approach – for the privacy rights of Comcast customers.

SED recommends that the Commission find that Comcast violated the privacy rights of non-published consumers which thereby violated the California Constitution, P.U. sections 2891.1, 2891, 451 and the other laws and Commission rules and orders discussed in SED's Opening Brief. For Comcast's egregious conduct revealed through this Investigation, SED requests that the Commission impose a substantial penalty on Comcast, and that the Commission also order the injunctive relief set out in SED's Opening Brief. In particular, Comcast should be ordered not to share non-published listings or any part of them with third parties except for 911 providers, and Comcast Phone should be ordered to assure itself that Comcast IP customers receive clear and complete disclosures before providing any numbering or directory listing services to Comcast IP.

[320] For the reasons stated above, SED remains concerned about the possibility that Comcast will present materially new facts and legal argument in its Reply Brief. To the extent that the Assigned ALJ or other decision makers wish further briefing, SED stands ready and willing to provide further briefing as

(Footnote continued on next page)

Respectfully submitted,

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